SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

vs.

WILLIAM P. MACCRACKEN, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Court of Appeals of the District of Columbia

No. 6166.

WILLIAM P. MACCRACKEN, JR., Appellant,

vs.

CHESLEY W. JURNEY.

a Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Petition.*

Filed February 12, 1934.

In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

To the Honorable the Supreme Court of the District of Columbia:

The petition of William P. MacCracken, Jr., respectfully shows:

1. Petitioner is a citizen of the United States and a resident of the City of Washington, District of Columbia.

2. Petitioner is now restrained of his liberty in the District of Columbia, within the jurisdiction of this court, by one Chesley W. Jurney, Sergeant at Arms of the Senate of the United States, unlawfully and without due process of law, and in violation of petitioner's rights under the Constitution.

3. Petitioner is held by said Chesley W. Jurney under color and claim of authority of the Senate of the United States, by virtue of an order or warrant signed by the President of the Senate directing the said Jurney as Sergeant at Arms to take petitioner in custody and bring him to the bar of the Senate to show cause why he should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memoranda from the files of petitioner after a subpœna had been served upon petitioner to produce certain papers, books and records before a committee of the Senate of the United States, as will hereinafter more fully appear. A true copy of said warrant or order of arrest is hereto attached, made part hereof, marked *Exhibit A*. Said warrant was issued pursuant to a resolution of the Senate adopted on the 9th day of February, 1934. Petitioner is restrained of his liberty only under and by virtue of said warrant, and not by virtue of any judgment or order of any court of justice.

4. Petitioner avers that no act of his is or was a contempt of the Senate nor a breach of its privileges; that the Senate is without jurisdiction to try or punish petitioner for the matters referred to in said warrant, or in the resolution directing its issue, and is without lawful power or right to arrest petitioner to answer a charge of contempt based thereon; and that the arrest and detention of petitioner under said warrant is without due process of law, is beyond the constitutional power of the Senate, and is in violation of petitioner's constitutional rights.

5. The facts upon which the Senate asserts its right to try and punish petitioner for contempt of the Senate are hereinafter fully set forth.

6. On the 25th day of February, 1933, the Senate of the United States adopted a resolution, known as Senate Resolution 349, 72nd Congress, Second Session, a copy of which

is hereto attached, marked *Exhibit B*, and made a part hereof.

7. On the 31st day of January, 1934, there was served on petitioner a subpœna duces tecum issued by the Committee of the Senate appointed under the aforesaid Senate Resolution 349 commanding petitioner to appear before said Committee "instanter" and to—

"bring all books of account, bank passbooks, cancelled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean mail contracts."

Copy of the said subpœna is attached hereto, marked *Exhibit C*, and made a part hereof.

8. Compliant to the command of said subpœna, petitioner did appear before said Committee on January 31, 1934, and again on February 2, 1934.

9. Petitioner is an attorney at law and he had at various times during the past ten years been employed as such by individuals and corporations engaged in the operation of airplanes over designated routes, and otherwise, and had rendered to his said clients services as attorney some of which services related to airmail contracts, and many of which services had no relation to airmail contracts. Under the filing system maintained in petitioner's office as an attorney at law in the City of Washington there were and are no such things as airmail contract files. File folders pertaining to the correspondence and documents relating to matters in connection with which petitioner was employed by any client having any airmail contracts con-

3 tained all papers, including memoranda, mail and telegraphic correspondence, etc., received from such petitioner's client, and copies of papers sent to said client, relating to said client's matters, as well as all other papers pertaining to matters referred to petitioner by any such client, or handled by petitioner for the client. Hence in numerous instances, at the time of the issuance of said subpœna, *Exhibit C* hereto, file folders contained papers relating to matters other than airmail contracts as well as, in the case of clients who had such contracts, papers relating to that subject. Among the papers in the possession of petitioner when said subpœna was issued were many communications relating to airmail contracts re-

ceived by him as attorney from his clients, and copies of many communications relating to airmail contracts sent by him as attorney to his clients as such.

Prior to the time of the service of said subpœna, investigators employed by the said Committee appeared at the office of petitioner and stated that they had been sent by said Committee to examine all the files in the office of petitioner regardless of what they pertained to, but thereafter limited their demand to an examination of all the files in petitioner's office which in any way pertained to airmail and ocean mail contracts. Said investigators informed petitioner, and on information and belief petitioner avers the fact to be, that they had been directed to make this examination of petitioner's files by said Committee.

Following said demand and the service of said subpœna petitioner appeared before said Committee and then and there made a statement, was interrogated and answered questions, all as fully appears in a transcript of stenographic report of proceedings before said Committee on said 31st day of January, 1934, copy of which is hereto attached, marked *Exhibit D*, and made a part hereof.

10. As appears from said *Exhibit D*, petitioner stated to said Committee, in substance, among other things, that he stood ready to produce to the Committee all papers called for in the aforesaid subpœna, excepting only communications between himself, as attorney, and his clients; that, as petitioner understood the law, communications,
4 whether oral or written, between attorney and client, relating to the subject matter of the attorney's employment, are privileged; that it is not within the power of the attorney to waive said privilege, which belongs exclusively to the client; that petitioner did not interpret the rule of law referred to as pertaining to any correspondence that might have passed between him and officials of the Government, or between him, as attorney, or his clients, and any other persons, or to cover any other document save those which constituted communications between attorney and client relating to the subject matter of the attorney's employment.

11. Thereupon petitioner was sworn as a witness before said Committee and there were questions propounded to him and he made answers thereto as will appear by reference to pages numbered 5068 to 5079 of the aforesaid Exhibit D. Under examination by the Chairman and other

members of said Committee petitioner testified, in substance, among other things, to the names of airmail operators he had represented as an attorney; to the fact that he had never represented any one having an ocean mail contract; to the character of services rendered by him to his said clients, and to the character of the communications between himself and his said clients which he considered were privileged. He was thereupon asked by the Chairman of said Committee if he would telegraph to his clients on the subject of the Committee's subpœna for papers relating to their contracts, and, complying with the Committee's request in that regard, he prepared an identic telegram to each said client, submitted the same to the Chairman of said Committee, who gave his approval thereto, and sent the same, by telegram, on the said 31st day of January, 1934, to each and every client of his who at any time, so far as his knowledge extended, had any airmail contract or contracts. Each of said telegrams was as follows:

"I have today been subpœnaed to produce before the Black Committee all papers memorandums correspondence maps copies of telegrams relating to air and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators Please wire your decision.

WM. P. MacCRACKEN, JR."

12. Compliant to the command of said subpœna, and on January 31, 1934, petitioner, as promptly as practicable, produced and made available to said Committee all papers, of every kind and description, in his possession, power or control, in any way "relating to airmail and ocean mail contracts", excepting only those embraced within his clients' privilege hereinbefore referred to.

13. The foregoing telegram was sent to Goodyear Zeppelin Corporation; Kohler Aviation Corporation; Ludington Air Lines; New York, Rio & Buenos Ayres Air Line, Inc.;

Northwest Airways, Inc.; Pan American Airways; Pittsburgh Aviation Industries Corporation; South American Air Lines, Inc.; Transcontinental & Western Air, Inc.; Western Air Express.

14. On February 1, 1934, petitioner informed said Senate Committee that he had been advised by telegraph that Goodyear Zeppelin Corporation and Kohler Aviation Corporation waived the privilege attached to their communications between them and petitioner and on said date petitioner produced for said Committee all papers relating to airmail contracts of said corporations. On the 1st day of February, 1934, petitioner, not having heard from the other clients to whom the aforesaid telegram had been sent, addressed and sent to each of the following corporations, Ludington Air Lines; Northwest Airways, Inc.; Pan American Airways; Pittsburgh Aviation Industries Corporation; Transcontinental & Western Air, Inc.; and Western Air Express, the following identic- telegram:

"I have been requested to appear before Black Committee tomorrow at ten AM to advise them about replies to wire sent you regarding waiver of privilege.

WM. P. MacCRACKEN, Jr."

15. On February 2, 1934, petitioner was again called before said Senate Committee, under the said subpœna, *Exhibit C* hereto, and there testified, and there were there announced the opinions and the ruling, and were had the proceedings, all as fully appears in stenographic report of proceedings before said Committee on Friday, February 2, 1934, which report is attached hereto marked *Exhibit E* and made part hereof.

16. The aforesaid telegram sent by petitioner to
6 Northwest Airways, Inc., on January 31, 1934, was addressed to L. H. Brittin, 1090 National Press Building, Washington, District of Columbia. Petitioner was first employed as legal counsel by said Northwest Airways on or about March 10, 1933, and his said employment terminated November 30, 1933, since which date he has not been employed by, or had any connection with, said company. On information and belief petitioner avers that on February 1, 1934, the said Brittin called at the office of the law firm of which petitioner is a member, said firm consisting of Frederic P. Lee and petitioner, practicing under the

firm name of MacCracken and Lee; subsequent to the issue of said subpœna petitioner had not seen said Brittin nor had there been any communication between him and petitioner; said Brittin, petitioner is informed and believes and therefore avers, advised said Lee that he had received the above referred to telegram; that, as said Lee knew, he, Brittin, had on occasions during the summer of 1933 been permitted, as an accommodation, to use said Lee's office room, and that while there he had dictated and had typed some letters of an entirely personal nature, having no relation to airmail contracts, copies of which letters he had permitted to remain in the folder in said firm's files in which papers relating to the business of said Northwest Airways, Inc., were contained; that he desired to remove from said files said personal papers; the said Lee handed to said Brittin the folder referred to and in the presence of said Lee there were removed from said folder several papers, the number of which said Lee believes to have been not more than five or six, the contents of which papers the said Lee did not see and was not familiar with, which papers, as hereinbefore stated, said Brittin stated did not relate to airmail contracts but were exclusively personal to himself and his correspondents to whom the originals thereof had been addressed. Petitioner had no knowledge whatever of the matters hereinbefore referred to in this sixteenth paragraph (except the reference to the sending of the telegram and the period of employment) at the time of their occurrence nor at any time nor until after they had occurred nor did he ever have any knowledge of said Brittin's call at said firm's office until after it had occurred and said Brittin had left.

17. On petitioner's appearance before said Senate
7 Committee February 2, 1934, he testified with respect to the facts set forth in paragraph 16 hereof and he hereby refers to, and makes part of this seventeenth paragraph, his said testimony so given on said subject, and avers that the same truly states the facts to the best of petitioner's knowledge, information and belief.

18. On February 3, 1934, the said Brittin appeared as a witness before the said Senate Committee and testified regarding the matters referred to in the sixteenth paragraph hereof and petitioner attaches hereto and makes part

hereof, as *Exhibit F,* transcript of stenographic report of said Brittin's testimony before said Senate Committee.

19. On information and belief petitioner avers that the testimony of himself and of said Brittin, referred to in the aforesaid paragraphs 17 and 18 hereof, respectively, and contained in *Exhibits E and F* hereof, constitutes all the information, facts and evidence before the said Senate Committee and before the Senate of the United States in respect of the removal by said Brittin of any papers from files in the office of petitioner's firm when the Senate of the United States on February 5, 1934, took the action hereinafter referred to in paragraph numbered 31 hereof.

20. The aforesaid telegram sent by petitioner to Western Air Express, Inc., on January 31, 1934, was addressed to Harris M. Hanshue, President, Western Air Express, New York City. Petitioner had been employed as attorney by said Western Air Express from December 1, 1929, to September 1, 1932, and has at no time since the last mentioned date been employed by, or in any way connected with, said Western Air Express. On February 1, 1934, said Hanshue by telephone informed petitioner that before his Company could make its decision on the subject communicated to it by said telegram of January 31, 1934, he desired to have an opportunity to look over papers contained in petitioner's files relating to said Company's matters and also to examine certain personal papers, not relating to air mail contracts, copies of which he believed were contained in some of said files; said Hanshue stated that he was sending to petitioner's office for that purpose Mr. Gilbert Givven, known to petitioner as one-time secretary to said Hanshue and as Washington representative of the Western Air Express. Following said telephone message from said Hanshue, said Givven made an appointment to
8 call at petitioner's office and did so on the afternoon of February 1, 1934; and compliant to the request of said Hanshue, petitioner permitted said Givven to examine the file folders in the office of petitioner's firm and to take therefrom, for the purpose of delivering them to said Hanshue, certain papers not relating to airmail contracts. Since February 2, 1934, petitioner has learned that among the papers taken by said Givven from petitioner's office for delivery to said Hanshue there were some which did relate to the subject of airmail contracts; petitioner avers that he did not recognize, at the time of the occurrence herein

referred to, that the last referred to papers were among those taken by said Givven, he had no intention of delivering to said Givven or permitting him to take from petitioner's office any papers relating to airmail contracts, and to the best of petitioner's knowledge and belief the inclusion among the papers taken from petitioner's office by said Givven, in the circumstances herein related, of any which related to airmail contracts, was unintentional and inadvertent.

21. On petitioner's appearance before said Senate Committee February 2, 1934, he testified with respect to the facts set forth in paragraph 20 hereof and he hereby refers to, and makes part of this twenty-first paragraph, his said testimony so given on said subject, and avers that the same truly states the facts to the best of petitioner's then knowledge, information and belief.

22. Immediately following petitioner's appearance before said Committee on February 2, 1934, he communicated with said Western Air Express and requested the immediate return by it of all of the papers taken by Givven as aforesaid.

23. On February 3, 1934, the said Givven appeared as a witness before the said Senate Committee and petitioner avers, on information and belief, that the said Givven then and there produced, under subpœna from said Committee, each and every paper taken by him from petitioner's office on February 1, 1934, in the circumstances hereinbefore set forth; petitioner further avers, on information and belief, that on said February 3, 1934, each and every paper so taken from petitioner's office as aforesaid, by said Givven, was delivered by the latter to said Senate Committee and that all of said papers have been in the possession
9 of said Committee since February 3, 1934, and are now in its possession.

24. Immediately following his appearance as a witness before said Committee on February 2, 1934, petitioner used his best efforts to have each and every one of his clients, who were concerned in the subject matter, expedite the decision requested in his aforesaid telegram of January 31st and shortly prior to the service upon petitioner, on February 2nd, as hereinafter set forth, of a warrant issued pursuant to resolutions on that date adopted by the Senate, all of petitioner's clients who were concerned had

waived their above referred to privilege and consented to petitioner producing under the command of the said subpœna all papers in his possession relating to airmail contracts. Promptly upon receiving information of said waivers of the said privilege, petitioner notified the Chairman of said Committee thereof and made available to said Committee, under the command of its subpœna, all papers in his possession relating to airmail and ocean mail contracts.

25. On February 2, 1934, the said Senate Committee submitted to the Senate of the United States, in open session, a report, numbered 254, which said report is set forth on page 1875 of the Congressional Record of February 2, 1934, as shown by said page which is attached hereto, marked *Exhibit G*, and made part hereof.

26. On February 2, 1934, after the receipt of the aforesaid report, the Senate of the United States adopted a resolution, Senate Resolution 169, 73rd Congress, Second Session. A copy of said last mentioned resolution appears on page 1876 of the Congressional Record of February 2, 1934, and is attached hereto, marked *Exhibit H*, and made part hereof.

27. On February 2, 1934, the President of the Senate issued a warrant, directed to Chesley W. Jurney, Sergeant at Arms, United States Senate, under the command and authority of which the said Sergeant at Arms on said date took petitioner into custody. Copy of said warrant is attached hereto, as *Exhibit I*, and made part hereof. As the Senate had adjourned when said warrant was served upon petitioner by the said Sergeant at Arms on February 2nd, petitioner was parolled in the custody of his counsel to appear at the bar of the Senate, in the custody of its Sergeant at Arms, at noon, February 5, 1934.

28. On February 5, 1934, petitioner and his counsel appeared in the office of the Sergeant at Arms of the Senate, petitioner being then and there ready to appear at the bar of the Senate in response to said warrant, to produce there all papers included within the aforesaid subpœna, and to answer such questions pertinent to the matter under inquiry as the Senate might propound. Petitioner was not taken before the bar of the Senate. Without being so taken, or without being required, or given an opportunity, to appear at the bar of the Senate, petitioner was by resolution, unanimously adopted by the Senate ordered to be released

from custody under Senate Resolution 169 and under the aforesaid warrant issued and served on February 2nd. And petitioner was then and there on February 5, 1934, released from said custody.

29. Prior to February 5, 1934, petitioner had produced and delivered to the Senate of the United States, under the command of the aforesaid Senate Committee subpœna of January 31, 1934, and the aforesaid Senate warrant of February 2, 1934, to the best of his ability, knowledge and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail and ocean mail contracts; on February 5, 1934, by order adopted by the Senate, all of said papers were turned over and delivered to the said Senate Committee and since that date they have been, and they now are, in the possession of said Committee.

30. As hereinbefore alleged, petitioner appeared as a witness, under said subpœna, before said Senate Committee on January 31, 1934, and answered all questions then and there propounded to him; he was at the Senate, in the custody of its Sergeant at Arms, on February 5th, and was then and there ready and willing to answer any question pertinent to its inquiry which might have been propounded to him; he has never been discharged from the obligation to appear again before said Senate Committee, in response to its said subpœna, and he stands ready, upon being notified so to do, to appear before said Committee at any time, and to answer all pertinent and material questions which may be propounded to him.

31. On February 5, 1934, the Senate adopted Sen-
11 ate Resolution 172, 73rd Congress, Second Session, copy of which resolution appears on page 1943 of the Congressional Record of said date, which is attached hereto, marked *Exhibit J*, and made part hereof.

32. On February 6, 1934, there was delivered to petitioner by Chesley W. Jurney, Sergeant at Arms of the Senate, a paper addressed by the President of the Senate to the Sergeant at Arms, commanding him to forthwith summon petitioner, and others named, to appear at the bar of the Senate in pursuance to the aforesaid Senate Resolution 172. Said paper is referred to therein as a "citation". Copy of said citation is attached hereto, marked *Exhibit K*, and made part hereof. Petitioner was not taken into cus-

tody by the Sergeant at Arms under the alleged authority of said citation but was cited thereby to appear before the bar of the Senate on Friday, February 9, 1934, at 12 o'clock noon, to show cause why he should not be punished for contempt on account of the destruction and removal of certain papers, files and memoranda alleged to be covered by the aforesaid Senate subpœna of January 31st.

33. On February 8, 1934, the Senate adopted a mode of procedure for the trial of petitioner at its bar, as will fully and at large appear by reference to pages of the Congressional Record of February 8, 1934, attached hereto, marked *Exhibit L*, and made part hereof.

34. February 9, 1934, petitioner addressed to the Senate of the United States a communication copy of which is attached hereto, marked *Exhibit M*, and made part hereof.

35. On February 9, 1934, the Senate under resolution on that day adopted by that honorable body issued to its said Sergeant at Arms an order or warrant as hereinbefore alleged, copy of said warrant being Exhibit A hereto. Said warrant was on February 9, 1934, signed by the President of the Senate and delivered to said Chesley W. Jurney, its Sergeant at Arms, and thereupon, on February 12, 1934, said Sergeant at Arms, Chesley W. Jurney, acting under the pretended authority of said warrant, arrested and detained and now restrains this petitioner of his liberty.

36. Petitioner avers that the Senate of the United States is without lawful authority to punish as a contempt
12 or as a breach of its privileges any of the acts of petitioner hereinbefore referred to; and petitioner further avers that there are no other acts of petitioner for which the Senate asserts the right to try and punish him and/or for which the last mentioned warrant of the Senate directed him to be arrested; petitioner further avers that the arrest and detention of petitioner is without due process of law and in violation of his constitutional rights.

Wherefore, your petitioner prays that a writ of habeas corpus issue, directed to the said Chesley W. Jurney, or to such other person or persons as then may have your petitioner in custody, commanding him or them to bring the body of your petitioner before this Court forthwith, and to show cause, if any he has or they have, for his detention; and that your petitioner be discharged from the unlawful

restraint and imprisonment by the aforesaid Chesley W. Jurney and any other person or persons acting under the pretended authority of the aforesaid Senate warrant; and that your petitioner may have such other and further relief as the nature of the premises may require.

WILLIAM P. MacCRACKEN, JR.,
Petitioner.

FRANK J. HOGAN,
EDWARD L. JONES,
Attorneys for Petitioner.

13 DISTRICT OF COLUMBIA, *ss:*

I, William P. MacCracken, Jr., being first duly sworn, on oath depose and say that I have read the foregoing petition by me subscribed, and know the contents thereof, and that the matters and things stated therein upon my personal knowledge are true, and those stated upon information and belief, I believe to be true.

WILLIAM P. MacCRACKEN, JR.

Subscribed and sworn to before me this 12th day of February, 1934.

FRANK E. CUNNINGHAM,
Clerk.

By HARRY M. HULL,
Ass't Clerk.

Fiat.

Let the writ of habeas corpus issue as prayed herein, returnable before me forthwith.

By the Court, this 12th day of February, 1934, at 2:00 p. m.

DANIEL W. O'DONOGHUE,
Justice.

14 EXHIBIT A.

United States Senate.

Washington, D. C., February 9, 1934.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate.

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forth-

with arrest and take into custody and bring to the Bar of the Senate, William P. MacCracken, Jr., in pursuance of the following order of the Senate, this day agreed to:

"Ordered, that an order for the immediate arrest of William P. MacCracken, Jr. be ordered by the United States Senate, directing the Sergeant at Arms of the Senate to take into custody immediately the body of William P. MacCracken, Jr. and bring him forthwith before the Senate, to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the special Senate Committee on Ocean and Air Mail contracts, and as directed in the citation previously served upon William P. MacCracken, Jr. by the Sergeant at Arms of the Senate."

Hereof fail not and make due return of this warrant.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this 9th day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

Attest:
(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

15 EXHIBIT B.

72d Congress, 2d Session.

Senate Resolution 349.

Resolution.

Resolved, that a special committee of the Senate, to be appointed by the President of the Senate after March 4, 1933, three from the majority political party and two from the minority political party, is authorized and directed to investigate and make a full, complete, and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail, both foreign and domestic, with a view to determining particularly (1) all the circumstances surrounding the execution and continuation of, and the necessity, if any, of maintain-

ing, altering, or canceling such contracts; (2) the organization and financial condition of the associations, partnerships, or corporations with which such contracts have been entered into, including a study of their capital stock, authorized and paid in, their receipts and expenditures, their total outlay in salaries paid to officers, executives, and employees, whether by way of bonus or otherwise, and their relationship, whether by interlocking directorates or otherwise, with any other individual, association, public official, partnership, or corporation, commercial or banking; (3) the extent of any activities by or on behalf of any association, partnership, or corporation with which such contracts have been entered into, in any effort to obtain, through legislation or otherwise, cash subsidies from the United States; and (4) any other facts relating to legislation or appropriations affecting air mail and ocean mail contracts, both foreign and domestic. The committee shall report to the Senate, as soon as practicable, the results of its investigations, together with its recommendations.

16 EXHIBIT C.

United States of America.

Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C., Greeting:

Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Ocean mail and air mail contracts of the Senate of the United States, on instanter, 193-, at 12 o'clock 30 m., at their Committee Room, 101 Senate Office Bldg. then and there to testify what you may know relative to the subject matters under consideration by said Committee.

Bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. F. Rittelmeyer to serve and return. Given under my hand, by order of the Committee, this

31st day of January, in the year of our Lord one thousand nine hundred and -4.

HUGO L. BLACK,
Chairman, Committee on ——.

17 EXHIBIT D.

Now, I understood that a witness who had been summoned who desires to make a statement to the Committee in reference to the summons.

Mr. MacCracken, I understood that there was some question that you desired to present to the Committee?

18 Mr. MacCracken: Yes, Senator.

The Chairman: Suppose you just go ahead and state what it is?

Statement of Mr. William P. MacCracken, Jr.

Mr. MacCracken: Mr. Chairman and members of the Committee, I am here in response to a subpœna which was served upon me this noon asking me, in addition to being present, to bring all books of accounts, passbooks, canceled checks, checkstubs, deposit slips, papers, memorandums, correspondence, maps, and copies of telegrams relating to air mail and ocean mail contracts.

The gentlemen who served the subpœna were informed by me that I was a member of the legal profession; that I would be very glad to furnish them with any matters which pertained to me personally, or to my firm, which is composed of myself and Frederic P. Lee, formerly legislative counsel of the Senate; that I would also be glad to furnish them with any papers or documents, such as called for in the subpœna, as did not relate to confidential communications between attorney and client, but that as I understand the law, communications, whether oral or written, between attorney and client, are privileged, and it is not within the purview of the attorney to waive the privilege and that, therefore, I would have to go through the files to determine what correspondence was and what was

19 not within the privilege.

I assured them, however, that my interpretation of that did not pertain to any correspondence that might have passed between our office and officials of the Government, either administrative or legislative.

Now, I can assure you gentlemen, that both on my professional honor and the honor of my partner, Mr. Lee, who I think is known to some or most of you, that anything we withhold under that understanding will be only withheld after it has gotten the joint judgment of my partner and myself.

It was suggested that the determination of that question should be left to the investigators to this committee, and I regret to inform you that if it should be your judgment—and I hope it will not, but it seemed to be theirs—we cannot accept that. The attorney can not shift the responsibility of determining what is or what is not confidential communications between himself and anyone else. I think that is about the situation, Senator.

I would like, perhaps, before closing, to say that it is my desire to cooperate to the fullest extent in furnishing any information which I think I may properly do, without violating the ethics and the law which governs the legal profession. It is not only the matter of the canons of ethics, but as I understand the rule, it is one laid down by common law which makes an attorney who does violate that confidence liable in damages to anyone who accuses him of wrongfully violating it and in some cases he has even been held guilty of slander or libel, if it was written, as the case may be.

The Chairman: The summons was served to bring those matters up here, and it is your insistence, as I gather it—and I want to be absolutely sure of it before the Committee takes it up—it is your insistence that the privilege extends to the point where the correspondence could not be brought here by subpœna if, in your judgment, it was confidential?

Mr. MacCracken: That is my understanding of the law, Senator, that it is not available for a court subpœna or any subpœna at all.

Senator King: But it must be correspondence exclusively between the attorney and client?

Mr. MacCracken: As I understand it.

Senator Austin: Relating to his employment?

Mr. MacCracken: Relating to the subject of his retainer.

The Chairman: As I understood from a brief statement made to me by Mr. Patterson, the question arose from cir-

cumstances like these—and I want to be sure we understand them fully——

Mr. MacCracken: Yes, sir.

The Chairman: The investigator asked for the correspondence and stated that it would not be necessary
21 to bring it if you would permit them to go over it. Is that correct?

Mr. MacCracken: He wanted to go through all the files in the law office regardless of what they pertained to. That was the first request. They wanted to go through all files and then he said, "We will limit it only so far as it pertains to air mail and ocean mail contracts."

The Chairman: May I ask if later there was an understanding that you would turn over to them such part as did not relate to letters directly between you and your client?

Mr. MacCracken: That is correct, sir.

The Chairman: And then the question arose, by reason of the fact that you were to decide when a paper was reached whether they should see it or whether they should not?

Mr. MacCracken: Yes, sir.

The Chairman: And it is on that issue that you and they disagreed?

Mr. MacCracken: That is my understanding of it, sir.

The Chairman: And in so far as your permitting them to see those things which you selected as not being confidential, that was all right?

Mr. MacCracken: Yes, sir.

The Chairman: And the sole issue is whether or not you should determine the privileged nature of the correspondence?

Mr. MacCracken: That is correct, sir.

Senator King: Only as between yourself and your clients?

22 Mr. MacCracken: No, sir; only between myself and my clients.

Senator King: And relating exclusively to the controversial matter?

Mr. MacCracken: Yes, sir, and I am glad to assure the committee that any communication between myself and members of either the administrative branch of the Government or the executive branch or legislative branch—

there have been none as far as I know with any member of the judicial branch—will be made available.

The Chairman: As I understand it, that is a privilege which the client can waive, is it not?

Mr. MacCracken: That is my understanding of it.

The Chairman: May I ask whether you have endeavored to ascertain from them whether or not they would waive it?

Mr. MacCracken: No, sir; I have not had any opportunity. This came up about 12 o'clock today when they came into my office. The subpœna was returnable at 12:30 and I think I accepted service at 12:20.

The Chairman: Then, as I understand it, the sole issue is that when a file was taken out, you would select those letters that you believed to be privileged and they would not be permitted to see them and they insisted on seeing all of the letters in that file?

23 Mr. MacCracken: Of course we were working very rapidly, I went through it and things clearly not privileged, I gave them the right of way. When I felt there was any doubt about it, I felt in the first instance I should resolve the doubt in favor of my client, but I told the investigators I wanted to go through the files again to make sure that I had not withheld anything that in my opinion, and in the opinion of my partner, we might both agree were not confidential, and if we did not agree they were confidential, we would turn them over to your investigator.

It was my purpose to go through those files I have gone through with them over again. Going through hastily, we want to be perfectly frank to the Committee and say that we may have refused to show some things which upon later examination we will be willing to show, but you must remember that if you violate the confidence, there is no way of repairing it and therefore the first doubts were resolved that way. For that reason, perhaps, the investigators got the impression I was holding out a great deal of material from them. I think in the long run, they will get the bulk of it, but if a mistake is made, as I say, there is no way of correcting it.

Senator White: I understood you to state that you did not include within the privileged class of communication

any letters or other forms of communication that had
24 passed between you and any Government official.

Mr. MacCracken: That is correct sir. I thought that was what they were most interested in and that is what I wanted to assure them they would get.

The Chairman: The Committee has not had this exact question up before. We have had the question of lawyers' privilege——

Senator King: I move we take a recess for 15 minutes and consider this matter.

(Whereupon the Committee retired to consider the question in executive session.)

The Chairman: The Committee will be in session. Mr. MacCracken, will you please be sworn?

Testimony of William P. MacCracken, Jr.

(The witness was duly sworn by the Chairman.)

The Chairman: Mr. MacCracken, may I ask you what air mail and ocean mail operators you have represented as a lawyer?

Mr. MacCracken: May I answer the last part of the question first, because it is simpler?

The Chairman: Yes.

Mr. MacCracken: I have never represented an ocean mail operator in the sense of operating by steamboats. I have represented operators that have flown over large bodies of water by aircraft.

25 Others that have air mail contracts——

The Chairman: Have had or sought to obtain air mail contracts?

Mr. MacCracken: I represented the Goodyear Zeppelin Corporation, which sought to get legislation——

The Chairman: May I ask you there if you represented them in the effort to have legislation passed?

Mr. MacCracken: I represented them in the drafting of legislation and in the hearings before the Committees and matters of that character.

The Chairman: That was the only legal representation you had for the Goodyear Zeppelin people?

Mr. MacCracken: Yes, sir. I have done some work for the Goodyear Tire and Rubber Company.

The Chairman: In reference to the Goodyear Zeppelin Company, in representing them in an effort to obtain legislation, do you claim that that representation is privilege?

Mr. MacCracken: No, sir, but communications between attorney and client are privileged.

The Chairman: You do claim privilege from divulging the correspondence between you and the Goodyear Zeppelin people at this time?

Mr. MacCracken: As I say, as far as it might be considered confidential, and that is a matter which I would have to——

The Chairman: What I want to get at is, do you
26 claim now the privilege in reference to the Goodyear Zeppelin Company that you have asserted in connection with correspondence passing between you and them with reference to their representation to aid them in securing legislation?

Mr. MacCracken: I would say in answer to that, Senator, if any of it, I felt were confidential, I would have to claim the privilege.

The Chairman: You do claim privilege——

Mr. MacCracken: In so far as it is confidential.

The Chairman: What would you consider confidential?

Mr. MacCracken: Well, a hypothetical case—let me put this as a hypothetical case, and I think perhaps you will agree with me: Suppose that they had asked my opinion as to the constitutionality of a certain provision that was proposed to be incorporated into the bill. I would say that, without a waiver from the client, that that opinion was confidential and that the facts they submitted to me upon which I based the opinion, I would not be at liberty to disclose. I do not think there was such a case. I am merely trying to cite something without disclosing the confidences——

Senator White: In effect, you claim to have the right to determine whether a particular communication is or is not of a privileged class?

Mr. MacCracken: May I answer that by stating it a little differently, Senator? I claim that I am under the
27 duty to do it—not that I have the right. I am not asserting any right.

Senator White: I accept the correction.

Mr. MacCracken: I feel that I am under a solemn duty.

Senator White: You assert the privilege?

Mr. MacCracken: Yes, sir.

The Chairman: That is the Goodyear Zeppelin?

Mr. MacCracken: Yes, sir, that is right.

The Chairman: And you do assert that privilege as to the correspondence?

Mr. MacCracken: If there is any. I have put some aside as under some doubt.

The Chairman: What is the next company you have represented?

Mr. MacCracken: The Western Air Express.

The Chairman: Were you employed to represent them in connection with obtaining a contract or in connection with legislation?

Mr. MacCracken: My original employment with the Western Air Express, Senator, dates back to 1925, when they got their first air mail contract, and I was retained at that time in connection with the preparation of their bid before the Post Office Department, and the objections which we filed to other bids at that time, as I recall.

28 The Chairman: Your representation of them then has been in connection with obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: And as to the correspondence that passed between you and them you assert the privilege?

Mr. MacCracken: I say that I feel that I am under the duty. That is correct.

The Chairman: What is the next one you have represented?

Mr. MacCracken: Pan American Airways.

The Chairman: Have you represented them in connection with obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: Have you represented them in connection with any other transactions with the Government besides obtaining air mail contracts?

Mr. MacCracken: Yes, sir.

The Chairman: In what other lines?

Mr. MacCracken: I have represented them before the Federal Radio Commission. We handle all their radio applications. We have represented them before the War Department; we have represented them before the Navy Department; we have taken up in their behalf——

The Chairman: Have you represented them in connection with the passage of legislation?

29 Mr. MacCracken: Yes, sir—that is, in an attempt to get legislation passed, but not with its passage.

The Chairman: Now, with reference to your representation of the Pan American Airways, do you also assert the privilege with reference to correspondence?

Mr. MacCracken: I believe that duty is on me.

The Chairman: Have you represented the Pan American Grace Company?

Mr. MacCracken: Only, I think, in connection with their applications before the Federal Radio Commission. They may have been—not in connection with getting of contracts. I never represented Pan American Grace in connection with getting of contracts.

The Chairman: What other companies have you represented in connection with the obtaining of contracts?

Mr. MacCracken: In connection with the obtaining of contracts?

The Chairman: Or modifications of contracts?

Mr. MacCracken: Well, the Kohler Aviation.

The Chairman: Did you represent them solely and exclusively in connection with obtaining air mail contracts?

Mr. MacCracken: No, sir, not solely and exclusively. I did other things for them.

The Chairman: Any transactions with the Government?

Mr. MacCracken: Well, some were with the Government and some with other parties. I think that applies

30 also to Western Air Express; in fact, I know it does.

The Chairman: Have you represented them in connection with any legislation?

Mr. MacCracken: No, sir.

The Chairman: Now, as I understand it, with reference to your correspondence and memorandums, etc., passing between you and the Kohler Aviation, you likewise claim the privilege of an attorney in that connection?

Mr. MacCracken: Yes, sir.

The Chairman: And what other companies have you represented?

Mr. MacCracken: Well, one of the companies which did not get an air mail contract was the Ludington Lines. I represented the Ludington Air Lines on two different occasions.

The Chairman: Was that in an effort to obtain contracts?

Mr. MacCracken: Yes, that was the principal part of the representation. There may have been other things I did for them.

The Chairman: With reference to the Ludington Lines, do you also assert privilege with respect to that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: What other lines have you represented?

31 Mr. MacCracken: The Transcontinental and Western Air?

The Chairman: The Transcontinental and Western Air?

Mr. MacCracken: Yes, sir.

The Chairman: Was that in connection with obtaining the contract from the Government for air mail?

Mr. MacCracken: Yes, sir.

The Chairman: And do you likewise claim a privilege with reference to the Transcontinental and Western Air?

Mr. MacCracken: Yes, sir.

The Chairman: What other companies have you represented?

Mr. MacCracken: I represented Mr. Richard W. Robbins, individually, or at least I was retained by Mr. Richard W. Robbins, personally—I had better put it that way—to do some work on behalf of a company in which he was then interested.

The Chairman: Was that the Pittsburgh Aviation Industires, Inc.?

Mr. MacCracken: Yes, sir, I was not employed by the company but by Mr. Robbins personally, as I understand by the retainer. That lasted just a year.

The Chairman: Did you represent them in connection with the buying out of Mr. Ball and in connection with the obtaining of contracts?

Mr. MacCracken: I represented them in connec-

32 tion with buying out Mr. Ball—in buying the interest they bought of Mr. Ball.

The Chairman: Did you represent them in their efforts to obtain a mail contract between Pittsburgh and Norfolk?

Mr. MacCracken: No, sir—yes, I think that is correct. I do not think they made any particular efforts between the latter part of October, 1930, when they closed the deal. The deal with Mr. Ball was closed early in November.

The Chairman: You claim a privilege also in reference to that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: What other companies have you represented?

Mr. MacCracken: I did some work for Northwest Airways during the year just passed. That was where they wanted some opinions. I rendered some opinions for them. I do not think I ever handled any of their negotiations with the Post Office Department.

The Chairman: Do you assert a privilege in connection with that representation?

Mr. MacCracken: Yes, sir.

The Chairman: In connection with correspondence, I mean?

Mr. MacCracken: Yes, sir.

33 The Chairman: What others have you represented?

Mr. MacCracken: Going back to 1925, I represented Colonial Air Transport, at the time that they got their original contract between New York and Boston, and I represented the National Air Transport——

The Chairman: In 1925?

Mr. MacCracken: Yes, sir, 1925.

The Chairman: Are you sure about that date?

Mr. MacCracken: Yes, sir, absolutely. It was the fall of 1925, that the contract was awarded. The service was started in 1926, but I am quite positive the bids were opened in September, 1925.

The Chairman: When did you leave the Commerce Department?

Mr. MacCracken: I went with the Department of Commerce in August of 1926. I had represented the Western Air, National Air Transport and Colonial Air Transport before going with the Department of Commerce, and my representation of Western Air and Colonial Air Transport had terminated some months prior to my going with the Department. I mean when they got the contracts, that was the end of that representation as I recall it. It is pretty far back, but that is as I recall it.

The National Air Transport, I assisted in the organization of the company and represented them up to the 1st of August, 1926. I was sworn in as Assistant Secretary of

Commerce, I think, about the 11th or 12th of August,
34 1926. I knew about the 1st of August, I was to be sworn in. I terminated my employment then and have not represented them at any time since.

The Chairman: Are there any others that you represented? What about the New York and Buenos Aires?

Mr. MacCracken: That was an effort to get a contract. I was chairman of the Board of the New York and Buenos Aires Company, and also acted in a legal capacity for them.

The Chairman: Do you claim a privilege for that correspondence?

Mr. MacCracken: Yes, sir.

The Chairman: Are there any others?

Mr. MacCracken: I do not recall any others at the moment. There may have been some others that I did some minor things for. I will be glad to furnish you a complete list. There is no desire to hold back.

The Chairman: As I understand it, you are asserting the privilege because of the fact, as you feel you owe it to your clients not to divulge these confidential communications?

Mr. MacCracken: Yes, sir.

The Chairman: Would you have any objection to wiring each of them and requesting that they release you so that the Committee will have access to those papers?

Mr. MacCracken: I do not think I should request them to do it. I should be glad to wire them that the Committee had raised the question, and ask them what action
35 they want me to take.

The Chairman: And you will wire each one and ask them whether or not they object to your turning over the correspondence to the Committee and if they do not object you will turn over the correspondence to the Committee?

Mr. MacCracken: Suppose we leave it this way: May I draft a wire which I think should be sent out and submitted to the Committee? I would like to send out a wire that will meet with the desires of the Committee.

The Chairman: Suppose you do that now?

Mr. MacCracken: I will be glad to.

(After a pause.)

The Chairman: The Committee is going to leave and I am going to stay here and look at the telegram.

Senator King: Prepare one, taking your time, and submit it to the Chairman.

The Chairman: The Committee will adjourn until tomorrow morning at ten o'clock.

(Whereupon at 5.40 o'clock, the hearing was adjourned until tomorrow, Thursday, February 1st, 1934, at ten o'clock A. M.)

36 EXHIBIT E.

Investigation of Air Mail and Ocean Mail Contracts.

Friday, February 2, 1934.

Special Committee on Investigation of Air Mail and Ocean Mail Contracts.

The Committee met, pursuant to adjournment, at 10:30 o'clock a. m., in Room 318, Senate Office Building, Washington, D. C., Senator Hugo Black (Chairman) presiding.

Present: Senators Black (Chairman), McCarran, King and White.

Also present: Mr. A. G. Patterson, Special Investigator for the Committee.

Proceedings.

The Chairman: Mr. MacCracken, will you please take the stand?

Testimony of William P. MacCracken.

(The witness had been previously sworn by the Chairman.)

The Chairman: Mr. MacCracken, may I ask you to place in the record the telegram that you sent to the various companies?

Mr. MacCracken: Yes, sir.

Senator White: May we hear it read?

37 The Chairman: Yes.

Mr. MacCracken: This was a night letter which was sent out January 31, 1934—that was day before yesterday, the day I appeared before the Committee:

"I have today been subpœnaed to produce before the Black Committee all papers, memoranda, correspondence,

maps, copies of telegrams relating to air and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and I have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators stop Please wire your decision.

"(Signed) WILLIAM P. MACCRACKEN, JR."

That was sent to Horace M. Hanshue, President, Western Air Express, 1775 Broadway, New York City; Richard W. Robbins, President, Transcontinental & Western Air, 1775 Broadway, New York City; Goodyear-Zeppelin Corporation, attention Mr. Hartham, Akron, Ohio; Mr. Richard W. Robbins and Pittsburgh Aviation Industry Corporation, 1775 Broadway, New York City; Mr. J. T. Tripp, President, Pan American Airways, Chrysler Building, New York City; C. T. Ludington, care Ludington Air Lines, Atlantic Building, Philadelphia, Pennsylvania; Mr.
38 J. B. Kohler, Kohler Aviation Corporation, Municipal Air Port, Grand Rapids, Michigan; Colonel L. H. Brittin, Northwest Airways, 1090 National Press Building, Washington, D. C.

Then I sent a similar telegram on yesterday as a day letter to Mr. Fremont C. Peck, President, South American Line, Inc., formerly New York, Bahia & Buenos Aires, Inc., 100 West Fifth Street, Wilmington, Delaware.

May I explain the reason for the delay in sending that wire? That was due to the fact that this company has been or is in the process of being liquidated, and I had a little difficulty in finding a name and address for it, and did not get it until yesterday, and then sent it as a day letter instead of sending a night letter the day before.

I also sent yesterday, at the suggestion of Mr. Robbins, a wire to Mr. Hann, who is President of Pittsburgh Aviation Industries Corporation in Pittsburgh. That does not appear on these telegrams, but I know if he asked me if I would send one there, as he is not actively connected with the company. You will recall this was originally with Mr. Robbins. He advised me before the year was up, the last two or three months of it were taken over by the corpora-

tion itself, and the personal relation did not continue throughout the full year. It was for only one year.

Then last night, after I heard from Mr. Patterson,
39 I sent a day letter to the same people mentioned, with the exception of Mr. Peck, from whom I had not had time really to hear. The day letter is as follows:

"I have been requested to appear before Black Committee tomorrow morning at 10 a. m. and advise them about reply to telegram sent you regarding waiver of privilege.

"(Signed) WILLIAM P. MacCRACKEN, JR."

I think of course very few of them got it last night, because I did not hear from Mr. Patterson until 10 minutes to 6. It took us about 20 minutes to get the telegram filed, but I figured a day letter rush would get there as quickly as a straight wire, and if they did not get them last night they will get them this morning. I assume the Committee would also like to have in the record the copies of replies I received?

The Chairman: Yes:

Mr. MacCracken: I received the following reply from Kohler Aviation Corporation signed, J. B. Kohler:

"This telegram is your authority to disclose to Black Committee any confidential communications or other papers held by you as our attorney relating to air mail matters stop Confirming by letter.

"(Signed) KOHLER AVIATION CORPORATION,
"J. B. KOHLER."

I might state also, if I may, that the investigators for the Committee worked practically all day yesterday
40 on these files and I had an appointment to meet them this morning and continue with them, but the Committee's request took precedence over that.

I also received the following day letter from Akron, Ohio, addressed to me at the National Press Building:

41 "We authorize you to make documents as to relations between us as your clients and you as our attorney available to Black Committee.

"F. M. HARPHAM,
"Vice President,"
"GOODYEAR ZEPPELIN CORP."

I also received this telegram at the hotel last night from Ardmore, Pennsylvania:

"Wire received. Will advise you not later than tomorrow night.

"(Signed) C. T. LUDINGTON."

Those are all the telegrams that I have. I had a telephone call this morning from Mr. Thatch, general counsel of Pan-American Airways, in which he stated that I would be furnished with authorization to make their files available to the Committee investigators.

Senator White: Who was that—Pan-American?

Mr. MacCracken: Pan-American, Mr. Robert Thatch, their general counsel.

The Chairman: You had no other replies?

Mr. MacCracken: I have had some telephone calls, Senator, in which the clients indicated that they would take counsel in regard to the matter and would let me hear from them promptly.

The Chairman: What clients were those?

Mr. MacCracken: I had a call from Mr. Hanshue, of Western Air Express, and Mr. Robbins, of T. & W. A. I think that is all. That very nearly completes the list, I believe. I have not heard anything from Mr. Peck,
42 of the old New York, Rio and Buenos Aires, but I feel that I have not had time for that.

The Chairman: Have you heard from the Northwest Airways?

Mr. MacCracken: No, sir.

The Chairman: Mr. Brittin is in the city, is he not?

Mr. MacCracken: I believe that he is.

The Chairman: Do you still decline to permit the Committee to have access to the correspondence, or to bring the correspondence to the Committee, in response to the subpœna?

Senator King: You mean as to all of those that he has not had waivers?

The Chairman: As to all or any.

Mr. MacCracken: Of course, as to those where I have had waivers, I am making these filed available. As to the others, my suggestion would be, if I may make a suggestion, that I be given a little further time in which to reply.

The Chairman: Do you still take the position that you decline to turn them over without their consent?

Mr. MacCracken: I feel that that is my duty, in so far as they are confidential. Of course this subpœna is what we would call a blanket subpœna. It is difficult to determine. There is no specific letter, or specific paper, or document called for in it. Therefore, the question of whether or not what the Committee desires would fall within the rule with reference to confidential communications.

43 It is almost impossible to determine, but in so far as it would fall within that category, I am still of the same opinion as to the duty which the law imposes upon me. Of course, I want it very clearly understood that I am making, that I will make available, and be very glad to, all of the files which I have which do not come within that category—and have from the first, before I came up here.

The Chairman: The files that are in your office are in exactly the same condition as when the subpœna was served, are they not? There have been none removed and none taken away?

Mr. MacCracken: As far as they relate to ocean and air mail contracts, that is correct.

The Chairman: Have any of them been removed?

Mr. MacCracken: You mean any files from the office?

The Chairman: Yes.

Mr. MacCracken: Yes, sir.

The Chairman: With reference to what?

Mr. MacCracken: With reference to matters that did not pertain to air mail and ocean mail contracts. What happened was this, as I understand it. Some of the clients at times have used our offices as their personal office, as it were. That is, they have come in and dictated personal letters to the stenographers, which I never saw, don't know anything about, don't know the subject of them. Those were not part of our files.

The Chairman: Who has removed them?

44 Mr. MacCracken: I understand—I didn't see him, but by partner, Mr. Lee, told me that Colonel Brittin had come and asked for some such correspondence, and some such correspondence was given to Mr. Givin.

The Chairman: Who is Mr. Givin?

Mr. MacCracken: He is Mr. Hanshue's secretary.

The Chairman: Of the Transcontinental Air Express?

Mr. MacCracken: Western Air Express.

The Chairman: Did you permit those to be moved?

Mr. MacCracken: Yes, sir. I thought that that was proper.

Senator McCarran: After the subpœna was served?

Mr. MacCracken: Yes, sir.

The Chairman: When were they removed?

Mr. MacCracken: They were removed yesterday.

The Chairman: Have any others been removed?

Mr. MacCracken: No, sir.

The Chairman: Were you there when they were removed?

Mr. MacCracken: I was there when Mr. Givin took the correspondence of Mr. Hanshue's. I was not in the room—I may have been in the office, I am not sure, but I did not see Colonel Brittin. All I know is that Mr. Lee told me, when he went over the file with him, he allowed him to take correspondence which was clearly that which had been dictated by Colonel Brittin to the stenographers, and with which neither he nor I had anything to do.

45 The Chairman: They were in your files, were they not?

Mr. MacCracken: Yes, sir; but they were the property of our clients.

The Chairman: And Colonel Brittin is one of the gentlemen who has made no statement to you of any kind whatever?

Mr. MacCracken: I asked Mr. Lee, when he told me about it afterwards, if Colonel Brittin had said what we should do with the official files, and he said no, that he had not. I personally have not talked to Colonel Brittin.

The Chairman: And you are sure that no other files of any kind have been taken away from the office and that they are all still there that were in your office at the time the subpœna was served on you?

Mr. MacCracken: To the best of my knowledge and belief, yes, sir.

The Chairman: There have been no letters removed except those?

Mr. MacCracken: Not to my knowledge.

The Chairman: Except those?

Mr. MacCracken: Except those.

The Chairman: I think the Committee should make a decision as to what it should do.

Senator King: Mr. Chairman, speaking for myself, I do not think that Colonel MacCracken is entitled to claim privilege with respect to any of the correspondence
46 between himself and his clients. This is not a proceeding in a court of law. It is an investigation carried on by a Committee of the Senate.

The rules of evidence which prevail in law may or may not apply, they may not be invoked by a witness to the same extent and to the same purpose that he could invoke those rules in a court of law.

The question of privilege does not extend to confidential communications between an attorney and his clients in a legislative investigation, and it would be for the Committee, after examining the records, to determine whether they are pertinent or material.

47 If the Committee believes the records to be pertinent to the inquiry and do shed light upon the transactions which are being investigated, then the Committee would have the right, notwithstanding the claim of privilege, to have those records made a part of the proceedings of the Committee.

However, the fact that they may be subpœnaed and brought into the Committee room does not meet that all of them are to go into the record. I think the witness would have the right then to contend that the correspondence or memoranda were not pertinent or germane or relevant to the inquiry. And if that were true, the objection to their admission might be properly interposed, but not upon the ground of privilege, but upon the ground that they are not pertinent to the inquiry. In other words, the rule of privilege, as I understand it, does not apply in legislative investigations.

I think that Hinds' Precedents establishes that rule, or rather, it supports that view. This appears in Hinds' Precedents. It is a quotation from Dimock, Congressional Investigating Committee, and it states the situation with reference to the applicability of court rules of evidence to investigations as it exists at the present time:

"Personal Guarantees—Questions of personal guarantees, as we shall discover, are in many cases inextricably

bound up with problems of committee procedure.
48 To begin with, it may be stated as a general proposition that the constitutional guarantees relative to trials do not control the rules of procedure within the Congressional Chamber. Investigations, it may bear repeating, are not trials. Therefore, the rules of a court of law do not apply. This was early decided in the cases of Robert Randall and William Duane, in 1795, and in the famous case of John Smith, a Senator from Ohio, in the same year. Since then the question has been raised repeatedly, but the decisions by the Committees, the two Houses, and the courts, have been uniformly insistent in declaring that the two Houses of Congress were not bound to follow the principles nor the precedents of courts of law in conducting investigations."

I think that view is supported also in the case of McGrain v. Daugherty, which is found in 273 U. S. 135. It is not necessary to examine that decision.

Mr. MacCracken: May I trouble you for the citation to the Supreme Court case? Both of them, if I may have them.

Senator King: The record which I read is found in Hinds' Precedents, and it is a quotation from Dimock—that is the offer—on Congressional Investigating Committees, 273 U. S. 135.

Mr. MacCracken: That is the Supreme Court case?

Senator King: Yes. The other, I think, is page
49 153 of Dimock. I thought it was inserted in Hinds' Precedents. I think that it is if I can turn to it.

Without further comment upon the matter, my opinion is that Colonel MacCracken will be required to submit for the consideration of the Committee the documents referred to in the subpœna, and the Committee will then determine, after examination, which are material and pertinent to the inquiry. If they are, notwithstanding that it may be charged that they are confidential communications between attorney and client, I think they would be admissible.

I make the suggestion, without having consulted with my colleagues, that if this view is accepted by the witness so as to absolve the Committee from the duty of looking over a large number of files—and as I understand, there are a large number of files—that Mr. Patterson, representing the Committee, or such other person as the Chairman

designates, may, in the office of Mr. MacCracken, examine the files and those letters, communications and documents which he thinks are pertinent or material or have any bearing upon the matters under investigation, that they may be brought to the Committee and then the Chairman and the Committee will determine their relevancy and materiality, and if they, upon examination, find they are material and relevant to the inquiry, that they are then available notwithstanding any claim of privilege that may be
50 asserted by the witness.

Senator McCarran: I want to supplement the remarks of Senator King and discuss it from two angles. First of all, that which is disclosed this morning indicates one matter of a serious nature, when the subpœna duces tecum was served upon the witness for the files and records, his acquiescence or permission given to the removal of any of those files impresses me as a direct violation of the summons and subpœna itself. We could have immediately impounded those files in the condition in which they existed. We did not do that.

Now it is disclosed that certain of those files have been—I might perhaps with propriety use the words, "tampered with"—but I won't go that far. I will say they have been removed, according to the testimony of the witness himself. Those papers were in his files, in his custody, in his control. He had no right to permit them to be removed during the pendency of this preliminary hearing, and while the subpœna was in full force and effect. That is the first thing.

Secondly, I view the position of Mr. MacCracken from just a little different angle. The immunity and the privilege granted to an attorney whereby he is not required under the rule to disclose confidential communications or confidential consultation between himself and his client does not and can not extend to the phase of the attor-
51 ney's work where he becomes a negotiator, so to speak, sometimes called a lobbyist—call it by whatever name you like—any dealing between so-called clients and Governmental agencies whereby he practically puts himself out of the atmosphere and category of an attorney and goes into the realm of a negotiator for the purpose of gaining an advantage for someone whom he represents from a Governmental agency. I do not believe, from my

reading of the rule, that the phase of the rule invoked by the witness is applicable in these cases any more than if one should engage a physician who, under the rule, may also invoke the right not to disclose matters of a confidential nature. If I engage a physician to deal with a Governmental agency, which might be done, could it be said with any degree of propriety that the physician could invoke the rule that he should not disclose confidential matters between himself and his client or his patient, *or his patient,* as the case may be? It seems to me to be too far-fetched.

I think that whenever an individual or an attorney takes up the work of negotiating between individuals seeking special privilege from Governmental agencies, that all matters pertaining to his services in that respect are entirely waive this privilege and authorize me to make these docu-
excluded from the rule of privilege. I think the precedents go that far and I think that common sense would go that far. Otherwise, there would be no chance for dis-
52 closures, no chance nor opportunity for a Committee to go to the depths that it should go in matters of this kind. While an attorney may perhaps advise his clients and be entirely, in some respects, protected from disclosing confidential communications, when he steps out of the category of an attorney and goes into the practice before Governmental agencies and Governmental bureaus, he leaves behind him the immunity that the law throws about him in the first instance, and the rule will not protect him from making the disclosures of matters material and relevant.

Whether it is a question of materiality and relevancy stands in a different category, but as to materiality and relevancy, my position in that respect is that it is a matter for the tribunal or committee to determine. Those are my individual views on the matter.

Senator King: Then you also support the view that in legislative investigation——

Senator McCarran: I support the view as set out by you, that in legislative investigations the rule does not apply as it does in court proceedings.

Senator White: Mr. Chairman, I am perfectly willing to make a matter of record my present thoughts about this

situation. I believe in the rule of privilege. I think that rule rests on considerations of public policy and in good sense, and I should be reluctant in the extreme to
53 see this Committee violate it.

I have had no opportunity to study the law since this question arose and I have no settled opinion as to whether the exceptions mentioned by Senator King and Senator McCarran are recognized in the law. I have some doubt about it.

But so far as I am concerned, Mr. Chairman, if clients in the circumstances which have existed during the past two or three days are ready to do such a fool thing as to go to these files and take any part of these papers while this question is under consideration by us, I can not get enthusiastic in asserting or making any controversy for the principle which I believe in. As far as I am concerned, I have no objection at all to the action which the three majority members of this Committee indicate they think ought to be taken. I can not think of anything more foolish than what these clients of yours have done. I am not going to say any more in behalf of this principle of privilege in these immediate circumstances.

The Chairman: Mr. MacCracken, may I ask that you read the subpœna which was sent to you?

Mr. MacCracken (reading):

United States of America, Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C., Greeting:

Pursuant to lawful authority, you are hereby com-
54 manded to appear before the Senate Committee on Ocean Mail and Air Mail contracts of the Senate of the United States, on instanter, 193-, at 12 o'clock 30 m., at their Committee Room, 101 Senate Office Bldg., then and there to testify what you may know relative to the subject matters under consideration by said Committee.

Bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. F. Rittelmeyer to serve and return.

Given under my hand, by order of the Committee, this 31st day of January, in the year of our Lord one thousand nine hundred and 34.

HUGO L. BLACK,
Chairman, Committee on ——.

Then there is the endorsement to be filled out on the back.

The Chairman: And in obedience to that you appeared before the Committee? That subpœna was not limited to papers which were in your files, which may have been written by someone else? As I construe that subpœna, it called for all files. In deference to your suggestion of privilege
55 and upon your statement made to the Committee that upon your honor as a lawyer and that of your partner this Committee could rest assured, as I recall it—you can correct me if I am incorrect—that the files were there and would remain there, the Committee took this matter under advisement.

Mr. MacCracken: I don't recall that. My recollection is, Senator, that what I stated was that my partner and myself would examine these files and only withhold such as we considered came within the rule of privilege. Now if I made any such statement as the other it has slipped my memory. I may have done so.

And I want to state now that I realize, as I did not before, these circumstances, the mistake which we permitted to be made yesterday on this matter. I can assure you at the time there was no intention to violate any pledge which I had given to the Committee.

With reference to the matter of further release on the privilege, Mr. Patterson has just handed me a copy of a telegram which he says was telephoned from my office. It reads as follows:

"William P. MacCracken, Jr.,
"National Press Building,
"Washington, D. C.

"With reference to your telegram you are hereby
56 authorized to permit Senator Black's representatives to examine such correspondence as we have had with you as our attorney.

"(Signed) L. H. BRITTIN,
"Ex. Vice President,
"Northwest Airways."

That was evidently received this morning after I left for the hearing.

57 The Chairman: Whatever the exact statement that was made, the Committee certainly had no right to anticipate that while this subpœna was pending, papers would be removed from the office.

I wish to make a few statements in connection with the entire broad subject, because I think it is of vital importance not only in connection with this but other questions that may arise concerning this Committee and other Committees.

In the first place, you have appeared before the Committee and claimed that your correspondence, memoranda and communications between yourself and certain clients are privileged. You base this claim upon the principle that certain confidential communications between a lawyer and his client are privileged to the extent that they cannot be used as evidence in connection with lawful employment over the objection of the attorney.

It is my belief in the first place that the employment of an attorney must be for legal subjects. It must come within the scope of what is generally recognized as legal duties. All of us know that the services with reference to negotiating with departments can be handled by others as well as by lawyers. I do not recognize and do not intend to recognize that the employment of a lawyer to negotiate with departments or with reference to legislation is within the scope of legal services. It can be performed by others as well as lawyers. Evidence before this Committee

58 which has not yet been offered shows that even interior decorators have been employed for these purposes, officials of companies, various individuals, so that in the first place I do not recognize that a claim can be based upon privilege for these negotiations with departments or for legislation simply because the man who happens to be employed is a lawyer.

There is a distinction which custom has brought about between services of a lawyer as a lawyer and services of a lawyer for some other purpose. If a lawyer should be employed to negotiate a trade for a wholesale mercantile establishment, certainly the communications would not be privileged, and the same thing in my judgment would apply to the employment of a lawyer to negotiate with the Gov-

ernment. It is not, in my judgment, a legal service, and for that reason, among others that have been suggested, it is my belief that a man, because he happens to be a lawyer, cannot claim a privilege for communications between himself and his employer. I recognize it as a contract of employment—not as a contract of employment as a lawyer.

In the next place, it is my belief that this privilege referred to, when legitimately invoked in a proper proceeding, should be protected where it is for a legal service, and in connection with a proceeding where privilege is
59 recognized. Whether the Senate Committee should recognize the privilege or not, I do not base my opinion upon my judgment upon that principle.

It is my further opinion that evidence should not be considered as privileged where the employment is for other than legal employment as generally recognized, where it is for an unlawful purpose or for the performance of duties contrary to public policy. Even if the original employment is legal but it is carried out in an unlawful manner or contrary to public policy, it is my judgment that such conduct would not then be privileged.

In other words, there is a clear and well recognized distinction between the kind of employment existing between attorney and client. When the nature of the employment of the attorney is such as to make the contract of employment void as against public policy or void by reason of the nature of the acts to be performed under the nature of the employment, or for other than legal services, manifestly this privilege should not be permitted to defeat justice.

It is my own belief that the employment of an attorney to aid in breaking down competitive bidding or to secure advantages over another competitive bidder is contrary to law and to public policy. The principle of competi-
60 tive bidding for Government services or Government contracts is well grounded in our system. This principle of competitive bidding was devised and provided for the purpose of protecting the public and the taxpayers from exorbitant prices for services or for commodities.

Congress itself has recognized the extreme importance of preserving this competitive bidding system and has not only provided that contracts obtained by collusive bids are invalid, but has expressly disqualified the bidder from obtaining a Government contract for a period of five years.

The evidence before this Committee has already clearly demonstrated to my mind that there was a secret gathering of aviation operators adjacent to the office of the Postmaster General for unlawful purposes. The public was excluded from this meeting. Only those acceptable to the Postmaster General and to the operators themselves were permitted to participate.

The evidence has also further disclosed that against the best interests of the Government and in order to unjustly, unfairly and illegally award certain mail contracts to certain participants in this meeting, an agreement was reached by the participants and the Postmaster General dividing up the air mail routes among one another.

The Chairman of this meeting was Mr. William P. MacCracken and the arbitrator was Postmaster General
61 Walter F. Brown. In my judgment, it would be contrary to the principles upon which the accepted idea of an attorney's privilege is based to extend it to communications relating to such transactions. Instead of protecting the ancient right of privileged communications between attorney and client, it is my judgment that such action on the part of this Committee would open up a train of evils which would inevitable result in the destruction of this fundamental doctrine and would defeat the ends of justice and fair dealings.

Numerous authorities could be cited to support these principles. An argument on the subject can be found in the case of Alexander v. United States, 138 U. S. Reports, p. 353.

It is my belief that this Committee should immediately obtain access to all the correspondence and communications passing between Mr. MacCracken and the air mail operators referred to in his evidence or bring it before the Committee, and should immediately issue a subpœna duces tecum to Mr. Brittin and Mr. Givens. I am not sure that they should not be cited for contempt.

I am not willing to recognize either in this case or in any other case a privilege under these circumstances. This privilege was intended to protect the relationship of lawyer and client in a bona fide legal representation concerning a legitimate and lawful subject-matter, for the ac-
62 complishment of a purpose in a legal and lawful matter. It is my belief that the employment of at-

torneys or individuals in the City of Washington or at other places for the purpose of obtaining advantages before Government Departments in the matter of Governmental services or contracts in such way as to prevent, obstruct or hinder legitimate competitive bidding, is not an employment which should be looked upon with favor, and in fact, is contrary to the best interests of the public and, therefore, contrary to the public policy of the nation.

Now, I believe, to be the appropriate time and occasion to declare that Government contracts should be awarded, free from outside influences, which influence would be worthless if special advantages in obtaining such contracts was not the objective of the employment. It is my belief, as I have stated, that none of the communications to which reference has been made are privileged; that all letters, papers, communications, and records, should be immediately produced for this Committee or should be made available for their use.

The employment for obtaining Government contracts, in my judgment should be discouraged, not encouraged. If the papers are not produced or made available, I believe this Committee should take immediate appropriate legal steps to obtain them.

I have stated these views because of my belief of the great importance of the question which has been
63 raised, not only as to the privilege claim, but by reason of the practice which has grown up in Washington, particularly of employing people, lawyers and others to aid in obtaining Government contracts. I do not believe that such employment for the purpose of aiding in the passage of legislation comes within the generally recognized scope of a lawyer's business. If it did, lawyers only would be employed, but others can practice in this way besides lawyers. No one can practice in the courts as a lawyer unless he has a license.

With reference to communications touching cases in the courts, so far as I am individually concerned, I would favor protecting them, either in a Senate Committee or elsewhere, even though I do not believe that the Senate Committee would be required to do so under the law as stated by Senator King, but as a question of policy with reference to the preservation of this privilege, which is a part of the public policy of the nation in connection with

employment for legal purposes by a lawyer within the scope of a lawyer's business, I would favor protection of the privilege.

I do not make that statement with any view to leave the impression that a lawyer should decline that employment any more than any other individual should decline the em-

64 ployment, but I do draw a distinction in my own mind between the employment of a lawyer for services which can be as well performed by a doctor or an interior decorator or a man who simply lives in Washington and does nothing else, and the employment of a lawyer to perform the duties which his license gives him the exclusive right to practice. That is the distinction I am seeking to draw, and I want it clearly and distinctly understood that, so far as I am concerned as a member of this committee and as a member of the Senate, I think this to be the appropriate time and place to take such action as will not encourage the continuation of practices before the departments with reference to matters which should be let by competitive bids, free, uninfluenced from outside sources.

For that reason I am perfectly willing to accede to the suggestion of Senator King, if it meets with the witness' plan, to let the investigators go over the papers. But if that is not to be done, not only with reference to these gentlemen who have replied, including Colonel Brittin, who has replied after he got his papers back, but with reference to all of them, I favor immediately impounding the evidence. I state that without any criticism of you for claiming this privilege as an attorney.

It is my judgment that the duty of an attorney is to claim a privilege if he is serving as an attorney, and has a privi-

65 lege to communication—I recognize that—but I take the position that they are not privileged, that the employment is not as an attorney, that it never has been as an attorney, and that by reason particularly of the special circumstances which have developed before this committee, even if the employment had been as an attorney, the circumstances of the meeting at the Post Office Department are sufficient to remove any privilege which might otherwise exist.

I would be very glad if, without the necessity of issuing any kind of papers, or enforcing the ruling of the Commit-

tee by impounding the evidence, they should be immediately made available.

Senator White: Mr. Chairman, I think you have made a very strong and a very persuasive statement. I should not want, without study of the question, to go on record as differing with the legal views you have expressed. I have had no opportunity to study this as a legal question. What you have said has so much impressed me, however, that I would not want to go on record as indicating a contrary view to that which you have expressed. I am perfectly willing to indicate my approval of the suggestion made by Senator King, so that we may have, with respect to that, the unanimous action by the Committee. As to the board and general principle of law, I don't know that it is necessary for us to immediately decide it.

66 The Chairman: I don't think so.

Senator King: Colonel MacCracken, are you willing that all the papers in your office now relating to these transactions referred to shall be examined by counsel for the Committee or their representatives and that they shall select from the mass of memoranda, papers and so on that you have such as they deem relevant or pertinent to the investigation which is being carried on by this Committee, and that those papers so selected by them shall be brought to the Committee and the Committee then shall determine just what part or all they may desire to have inserted in the record as a part of the hearings.

Mr. MacCracken: Mr. Chairman, before replying to Senator King's question, may I make a statement? Will that meet with your approval, Senator King?

Senator King: Yes.

The Chairman: Go ahead.

Mr. MacCracken: I feel sure that the Chairman of this Committee and the members of this Committee would not want knowingly and willingly to reach and publish a judgment without hearing both sides of the case. My employment by these air mail contractors and those who sought contracts involved the performance of legal services as well as services which were perhaps not legal.

Whether you are working for a client in Washing-
67 ton or any other city in the United States, we all know that lawyers are constantly called upon to per-

form services which can be performed by laymen. Unfortunately, it is also true that laymen sometimes are called upon and do perform services which should be performed only by lawyers.

I tried to make my position clear to the Committee when I appeared here day before yesterday, that in so far as any communications between myself and the officers of the Government or members of Congress were concerned, that those I did not consider came within the privilege and any matters which had to do, perhaps, with negotiations that were not legal—it is difficult sometimes to determine where a knowledge of the law is essential and where it is not, and sometimes a man gets along without a lawyer when he should have one, even though they may not be performing legal duties within the definition of the law.

My desire was solely to perform the duty which I felt and which I feel every member of this Committee recognizes a lawyer owes to his client. It is not a rule of evidence that is involved. It is a rule of law, a rule of the common law, the cloak of privilege which the common law throws around the confidential communications between an attorney and a client. The client is the one who determines whether or not those communications are confidential. Of course the attorney in the first instance, if
68 he is the one that is called upon to reveal them, is the one who is in duty bound to assert the privilege, but he has no right to waive it. I think that that is accepted as the law by all the members of the Committee.

With reference to the distinction between court proceedings and legislative inquiries, I recognize, as Senator King pointed out, that the strict rules of evidence with reference to hearsay testimony, secondary evidence, matters of that kind do not apply. But this is not a rule of evidence that is involved. It is a privilege, and as I say on that, it is one that I have no right to waive.

Now I also feel that at this time I may be privileged myself to make a word of explanation with regard to the meeting which the Chairman referred to in his opinion, and which he felt, because of my participation in that meeting, deprived my clients, both those whom I represented there and those whom I represented afterwards—because there were some of the clients on these lists that I did not represent at that time, the majority of them I did not

represent in that meeting, there are only two that I represented in that meeting—deprived them of the right of the privilege. That meeting was called by the Postmaster General. We were there at his invitation. We did not determine who should attend the meeting and who should not attend the meeting. A gentleman by the name
69 of Mr. Moore and I forget the other, was it Wolman, were among the first ones—I guess they were not the first—that had not been invited that came to my office and asked if they could attend the meeting. I explained to them that I had nothing to do with the make-up of the personnel of that meeting, that we had been called there in an advisory capacity by the Postmaster General; that as far as I was concerned I would be very glad to have him and his client attend the meeting and that I would bring the matter to the attention of the Postmaster General, which I did, and they attended a subsequent meeting.

The gentlemen who attended the meeting came on the last, or the next to the last day, as I recall it. The meeting was originally convened, if my recollection is correct, on the 19th of May, 1930——

Senator King: I have just had a call from the White House and it will be necessary for me to leave. Please excuse me.

Senator McCarran: I have had a call too. I mean no discourtesy to you, Mr. MacCracken.

Mr. MacCracken: I appreciate that and I appreciate the expression of frankness on the part of the members of this Committee, and I have the highest regard for it. If I come to the conclusion that the duty which the law
70 imposes upon me is in conflict with the opinion of the Committee, I will do so with the very deepest regret. I would like, however, before winding that up, to continue my statement. I was saying that that meeting was originally called for the 19th of May, or it met on the 19th, as I recall it. The Postmaster General at that meeting recited the events which had led up to the passage of the 1930 amendment to the Air Mail Law. I won't attempt to quote his language, but briefly, the facts were these:

The original law was passed in 1925, as I recall it. At least that was when the first contracts were let. The contracts were let for a four-year period. In 1928 when, as the result of unrestricted competitive bidding, lines had

been bid in at ridiculously low prices—I don't recall whether the contract I am about to speak of was bid in in 1928 or 1929, but in one of those years, I think it was, that one was bid in at as low a rate as 9 cents a pound.

The result was that the first amendment in 1928 provided for an extension of the existing contract—that is, if in the judgment of the Postmaster General it was in the public interest—in order to protect the equities of the pioneers who had gone out and started these routes, not knowing what the return was going to be, and who had sustained substantial losses.

71 That legislation provided that the Postmaster General could accept a surrender of the contract any time before it expired, and after it had been in operation two years, and exchange therefor a route certificate which would be good for not to exceed ten years from the time that operations started under the contract.

The consideration running to the Government for the extension of the time of the contract was that the Postmaster General should have the power to fix the rate of compensation to be paid the carrier which should not exceed the rate per pound which the carrier had bid in originally securing the contract.

While that law was passed under the administration of Postmaster General New, no action was ever taken under it. When Postmaster General Brown came into office, the first of these four-year contracts was nearing the period of expiration. He was new to the air mail business, or, perhaps I should say, it was new to him.

The Chairman: What department had he been in before he went with the Post Office Department?

Mr. MacCracken: He had been with the Department of Commerce.

The Chairman: What had he been doing in that department?

Mr. MacCracken: Assistant Secretary.

The Chairman: Which Assistant Secretary?

Mr. MacCracken: The assistant that had to do with matters not connected with aviation.

72 The Chairman: What did it have to do with?

Mr. MacCracken: Domestic and foreign commerce, Bureau of Standards, Bureau of Lighthouse, save and except the Bureau of Aviation, and there was the Bureau

of Standards again, as far as the aeronautical activities were concerned, Bureau of Mines, Coast and Geodetic Survey. Again there was an exception there so far as their airway map program was concerned, and generally all the other bureaus.

The Chairman: That did include, however, did it not, the shipping, foreign and domestic commerce?

Mr. MacCracken: I believe in the Bureau of Foreign and Domestic Commerce there was a division that had to do with marine transportation. I forget the exact name of it, but I recall that there was such a bureau.

The Chairman: And it is true, is it not, as I understand it, that Mr. Brown, as Assistant Secretary of Commerce, before he became Postmaster General, was in charge of the departments of the Secretary of Commerce that controlled the Merchant Marine in so far as it was controlled by the Department of Commerce?

Mr. MacCracken: I believe that is correct, Senator. He was the one who was performing the duties. Perhaps I should let him answer on that, but there were only two Assistant Secretaries. Some of the work was delegated to the solicitor of the Department, at times.

The Chairman: But in 1928, before he became
73 Postmaster General, he did have charge, for the Department of Commerce, of that department which had control over the Merchant Marine, did he not? And shipping?

Mr. MacCracken: I think so.

The Chairman: And had had for several years.

Mr. MacCracken: Not for several years, because I think he was only with the Department for about a year and a half, or less, maybe.

The Chairman: And that was immediately before he became Postmaster General?

Mr. MacCracken: Yes, sir. He went from Assistant Secretary of Commerce to the Postmaster Generalship.

The Chairman: All right. Go right ahead.

Mr. MacCracken: But in that connection I should say that he evidenced no interest whatsoever that I can recall in aviation during the time that he was in the Department of Commerce. The Postmaster General, Mr. Brown, after he had had the time to familiarize himself with the situation with reference to air mail contracts, apparently

reached the conclusion that the amendments which Congress had passed in 1928 would not suffice to enable these lines which had taken in their contracts at ridiculously low prices, that they were just losing money like water through a sieve, to continue, and apparently he came to the conclusion that the way to pay the air mail contractors was not on a poundage basis but on a mileage basis,
74 and that they should all be treated equally.

As you are aware, the postal laws permit the Postmaster General, without competitive bidding, to put mail on all of the railroads. In that particular case, the rate paid by the Government is not fixed by the Postmaster General, but is fixed by the Interstate Commerce Commission, which would appear to be, on the face of it, and which I think is, an added protection to the carriers, because, if my recollection serves me correctly, the carriers on several occasions have gone to the Interstate Commerce Commission, over the opposition of the Post Office Department, and have had their rates increased.

The bill which the Postmaster General sent up to Congress, understand, was first introduced by Congressman Watres in the House. I think it was H. R. 9500, if I recall it correctly, and involves the precedent with reference to railway mail except that both in the certificate and in the case where mail was put on lines that had been operating six months under regular schedules over routes 250 or 400 miles—I am not sure which, both figures entered into it—the Postmaster General had the power to fix the rate and not the Interstate Commerce Commission. So that the only appeal which was left to a contractor who was not satisfied with the rate that the Postmaster General might fix was to the courts and not to the Commission. I was always of the opinion, and still am, that a contractor, under those circumstances, has the right of appeal
75 to the court, although no such right, as far as I know, has ever been asserted.

That was the situation, as I understood it, with reference to the air mail when that legislation was sent up to Congress. There was opposition to it and the contracts were about to expire. Some of them had been extended under the six months extension privilege.

One of the other provisions in the original legislations which was sent up—and it is in the Act as passed—was that the Postmaster General could make any extension or consolidation of existing routes. Prior to that time it is my understanding that the Comptroller General had ruled that the Postmaster General could make an extension not to exceed one hundred miles of an existing air mail route, provided it did not extend the route beyond a thousand miles. I have forgotten whether it is in the opinion, but I have always understood the reason for the thousand mile limitation was because the contractor was entitled to an added compensation under the original law if the carriage exceeded one thousand miles.

Now those are some of the complicated problems which were presented to the Postmaster General when he came to the matter of this legislation. The legislation which was finally passed was a compromise. It did not authorize him to put mail on any route that had been running, but it did give him these broad powers with reference to extensions and consolidations.

The legislation was passed, as I recall it, on the last
76 of April in 1930. The contracts were to expire some time in May, those that had been extended. The first business at hand was the surrender of the contracts and the getting of the route certificates.

But to my mind the examination of the route certificates and any questions that arose in connection with it called for legal drafting, called for legal contracts, and was one of the things in which I represented the Western Air Express.

After that was out of the way, the Postmaster General then called a conference of the operators and he explained to them that this air mail map had grown up in a sort of hodge-podge fashion, that it was the intention of Congress that the pioneers, particularly those who had pioneered in passenger business, without air mail, and of whom there were a great many, should be given recognition and assistance. He had had some public hearings on the question of new routes in the Department, and now he wanted advice on and recommendations of this group of the operators, some of whom were mail contractors and some of whom were not. He put up the problem of existence of extensions; he put up the problem of extension of existing

routes, and also of the establishment of two transcontinental routes.

As I recall it, he said that he had just one suggestion to make, and that was that the two new transcontinental routes should be competitive as between themselves, and with reference to the existing route. In other words,
77 he wanted a competition of service from three transcontinental routes and he wanted them segregated, one from the other. He said, "It is not your problem to determine how this will be worked out. All I ask of you is your recommendations and I would like to get them as quickly as possible."

With that, he withdrew from the meeting. I understand some question has been raised as to how I happened to become chairman. As the Postmaster General was going out of the meeting, I think it was Mr. Cathell, a lawyer from New York, who suggested to the Postmaster General that this was a rather large group and that somebody ought to be charged with the duty of presiding. The Postmaster General said to Mr. Cathell, in reply, "I would prefer that you would select your own chairman, or organize in any way you see fit. The facilities of the Post Office for meeting places, and all that sort of thing, are at your disposal." With that, he walked out.

Then Mr. Cathell said, "I nominate Bill MacCracken." This was after the Postmaster General retired. Mr. Cathell said, "I nominate Bill MacCracken to act as chairman of the meeting, because, as I understand, he is here representing two clients, one of whom is an air mail contractor and the other is not, and I think he should be the presiding officer," or something to that effect.

78 He put the question and it was unanimously carried, and from that time on I acted as Chairman of the meeting. Before doing so I incidentally called my clients together, two of them, and said, "This matter may take me out of some of the discussions, because I intend to preside and not argue all the way through." They said, "That is all right, we will do our part of the presentation."

That meeting was not secret, as I regard it. We have no authority other than to make recommendations, and we finally made recommendations, the majority of which were not carried out, I think, as things have since turned out.

The Chairman: Are you sure about it?

Mr. MacCracken: I haven't checked it to make sure on the majority, but they were not carried out right away, and a great many of them have never been carried out.

The Chairman: Which ones?

Mr. MacCracken: There was never an extension to Lethbridge, which was recommended.

The Chairman: Who was to get it?

Mr. MacCracken: The National Parks.

The Chairman: What other?

Mr. MacCracken: It was a long time afterwards before the Albany-Boston extension was in effect. It finally was.

The Chairman: Who got it?

Mr. MacCracken: Aviation Corporation.

79 The Chairman: Who was recommended to get it?

Mr. MacCracken: They were recommended, as I recall it. I don't think the Vancouver extension was ever put into effect. That was one where United was to get the first schedule and Varney was to get the second, according to the recommendations.

The Chairman: What others were not carried out?

Mr. MacCracken: Well, let me see. I don't have my copy of that report with me.

The Chairman: Have you the map?

Mr. MacCracken: No, sir.

The Chairman: What went with the map?

Mr. MacCracken: The map was with the report.

The Chairman: Turned over to the Postmaster General?

Mr. MacCracken: I think so, or to one of his assistants. I am not sure whether he took it or Mr. Glover or Mr. Wadsworth. I think they were all there in the meeting. What became of the map I don't know.

The Chairman: As a matter of fact, Mr. MacCracken, is it not true that every air mail contract that was awarded was awarded according to the recommendations made at that meeting?

Mr. MacCracken: No, sir.

The Chairman: Which ones were not?

Mr. MacCracken: I have just mentioned two.

80 The Chairman: You say they were not awarded?

Mr. MacCracken: Oh, awarded. I remember very well when we turned in that report the Postmaster General

said, "Gentlemen, you have decided"—not decided, but made recommendations——

The Chairman (interposing): I don't want to interrupt, but I asked you the question if it is not true that every air mail contract that was awarded was awarded according to these recommendations?

Mr. MacCracken: You mean where there were definite recommendations?

The Chairman: For a certain company to get a certain line.

Mr. MacCracken: Well, I would want to check on that. I am not absolutely certain about it. That is not true, Senator.

The Chairman: All right, which one did not get what was allotted to it?

Mr. MacCracken: Western Air Express did not get the extension from Amarillo to Dallas.

The Chairman: Senator White has suggested to me he understood the meeting was called for the purpose of passing on this question, which was true. Of course we want to have the correspondence before we go fully into this matter, and I told him that I was not objecting to your talking, because I thought you wanted to make this statement. We do not want to go fully into that matter at this time, but I don't want to deprive you of the right which you asked to make a statement, and that is what I told
81 Senator White.

Senator White: I did not want to interrupt anything you might want to say which bore on this question of privilege, but I had assumed this was to be a meeting of but a very few moments, and I had made some appointments. I am late to them now and I was getting a little fretty. Will you confine yourself at this time to anything that bears on this question of privilege—if that is all right, Mr. Chairman, with you?

The Chairman: That is all right.

Mr. MacCracken: There is, I believe, another side to the story with reference to what transpired in those conferences that led up to the recommendations to the Postmaster General and what transpired afterwards, and as far as the facts and the happenings are concerned I trust that the Chairman and the other members of the Committee will reserve their judgment until they have heard both sides.

The Chairman: I should like to state to you, Mr. MacCracken, that I will be very glad to join with the other members of the Committee in according you the privilege of making a statement or testifying at any time you desire to testify. I do not want to interrupt you now by reason of the fact that we have made some statements.

Mr. MacCracken: I appreciate that, and I felt that they perhaps called for an answer, and I have attempted
82 to make a partial answer.

Now, then, with reference to the matter of these files and records——

The Chairman (interposing): What the Committee would like to know is this: If you will give them access immediately to these records, so that we do not have to send down and impound them. Getting back to these files, may I ask if these files were taken in the day time while the inspectors were there.

Mr. MacCracken: I am not sure with reference to Colonel Brittin when he came in and got his. I think these papers which Mr. Givin took were taken after the inspectors left.

The Chairman: The inspectors said to us that they stayed there throughout the day and no papers were removed while they were there.

Mr. MacCracken: I can not be sure, because I did not give Colonel Brittin his papers.

The Chairman: What time did you give them to Mr. Givin?

Mr. MacCracken: I think Mr. Givin left the office between 6:30 and 7:00 o'clock.

The Chairman: Did you call him and ask him to come down?

Mr. MacCracken: No, sir, he called me. I did not send for him.

The Chairman: Did he know about the examination that was going on?

83 Mr. MacCracken: I think he did.

The Chairman: They got both papers, did they not, after the inspectors left?

Mr. MacCracken: I don't believe that is the fact with reference to Colonel Brittin.

The Chairman: The inspectors state they knew nothing about it, certainly they were not told anything about it, according to the information they gave us, and they stated

they remained there throughout the day until the office closed.

Mr. MacCracken: I would have to check up with Mr. Lee, because he is the one who turned over the papers to Colonel Brittin.

The Chairman: Did you go back to the office with Mr. Givin after it had closed?

Mr. MacCracken: No, sir. He came while I was still there. I did not go back to the office after I left last night and went home, until this morning.

The Chairman: Of course you understand that the attitude of the entire Committee is that they want the papers, and if you will give them access to them now, they can go right ahead and look at them. If not, the Committee will send down and impound the papers.

Mr. MacCracken: I regret exceedingly having done anything which would call forth the comment which has come from the Committee. It was certainly unintentional
84 on my part, and I will be only too glad to do what I can to rectify it.

Senator White: It has made a very embarrassing situation for some of us who have been inclined to recognize this privilege which exists. So far as I am concerned, I had assumed, without any question whatsoever, that while this matter was being discussed in the Committee, there would be no change in the status with respect to these papers, and it came as a shock and a disappointment to me to find that some of these papers, which were possibly within the reach of this subpœna, had left your office. I just cannot justify that. I can not see any possible justification for it, and, as I said a moment ago, I have lost some of my enthusiasm for the principle.

Mr. MacCracken: I can assure you, Senator, I will do everything within my power to rectify that situation.

The Chairman: You mean you will try to get them back immediately?

Mr. MacCracken: Yes, sir; certainly.

The Chairman: And will you let the inspectors now go ahead and see them, without the necessity of impounding the evidence?

Mr. MacCracken: There is no occasion to impound the evidence, Senator, I think, in this matter.

The Chairman: Then you will permit them to see them?

Mr. MacCracken: I have not said anything about seeing them, but I can assure you——

85 The Chairman (interposing): If they can not see them now, the Committee has decided to send down for them, if they are not to be granted access to them. They have ruled against your question of privilege unanimously, those of the members of the Committee who were here.

Senator White: I was in accord with the motion of Senator King, and I am in accord with it, because of the unusual circumstances which exist here.

The Chairman: So it is a question now for decision, whether we shall have to send for the records, or whether you will make them available. That seems to me to be the most practical way, because they are there, and this Committee has the power to obtain them.

Mr. MacCracken: Of course that is the question.

The Chairman: I do not think it is a question about the Committee having the power to obtain them. The only question is whether you have the right to claim the privilege. Of course, if you do not desire to do that, we will send for them immediately. But we do not care to do that if it can be handled otherwise.

Mr. MacCracken: May I be accorded the privilege of telephoning for some counsel and advice on this question, by an interested party?

The Chairman: If it is just a matter of a few minutes, we will wait here until you call up.

86 Mr. MacCracken: Thank you.

(A short recess was taken to permit the Witness to telephone.)

Mr. MacCracken: Pursuant to the privilege accorded me by the Committee to seek advice, I have done so and I am again advised that this is a privilege which I have no right to waive.

The Chairman: All right.

Mr. MacCracken: I am very sorry.

The Chairman: That is all.

The Committee will adjourn until ten o'clock, Tuesday morning, February 6, 1934.

(Whereupon, at 12:30 o'clock p. m., the hearing was adjourned until Tuesday, February 6, 1934, at 10:00 o'clock a. m.).

87 EXHIBIT F.

Investigation of Air Mail and Ocean Mail Contracts.

Saturday, February 3, 1934.

Special Committee on Investigation of Air Mail and Ocean Mail Contracts.

The Committee met at 11 o'clock a. m., in Room 318, Senate Office Building, Washington, D. C., Senator Hugo Black (Chairman) presiding.

Present: Senators Black (Chairman), McCarran, Austin, and White.

Also present: Mr. A. G. Patterson, Special Investigator for the Committee.

Proceedings.

The Chairman: The Committee will please be in order. Colonel Brittin, will you please take the stand?

Testimony of Colonel L. H. Brittin.

(The witness was duly sworn by the Chairman.)

The Chairman: What are your initials, Colonel?

Colonel Brittin: L. H. Brittin—B-r-i-t-t-i-n.

The Chairman: With what company, or air mail company, are you connected?

Colonel Brittin: The Northwest Airways.

88 The Chairman: What is your official position?

Colonel Brittin: Executive vice president.

The Chairman: Do you have an office in Washington at 1090 National Press Building?

Colonel Brittin: I do, Senator.

The Chairman: Did you have an office at 1090 National Press Building, Washington, for the last ten days?

Colonel Brittin: Yes, I did.

The Chairman: Did you receive a telegram from Mr. MacCracken, William P. MacCracken, Jr., on January 31, 1934, with reference to his files and memoranda?

Colonel Brittin: I don't recall it, Senator; I don't recall any such telegram.

The Chairman: You replied to it, did you not?

Colonel Brittin: I don't recall. You will have to refresh my memory on that.

The Chairman: Will you read this (handing to the witness a copy of the proceedings of the Committee of February 2nd)?

Colonel Brittin (after examining minutes): Yes, sir; I received that telegram.

The Chairman: Will you read that, so it will get in the record?

Colonel Brittin: I have today been subpœnael to produce before the Black Committee all papers, memoranda, correspondence, maps, copies of telegrams relating to air
89 and ocean mail contracts stop In so far as these involve confidential communications between us as attorney and client I have felt it my duty to assert and I have asserted the privilege which the law places around such communications stop The privilege may be waived only by you as client stop The Committee has requested me to inquire whether you desire to waive this privilege and authorize me to make these documents available to the Committee investigators stop Please wire your decision. (Signed) William P. MacCracken, Jr.

The Chairman: When did you receive that telegram?

Colonel Brittin: I don't recall, Senator, but it must have been, of course, the day on which it was sent. It was sent to 1090 National Press Building.

The Chairman: Did you get it at the Press Building? Do you remember when you received it?

Colonel Brittin: No, right this minute I don't recall when I received it, but I must have received it there.

The Chairman: The first time you saw it, was it at the National Press Building?

Colonel Brittin: Yes.

The Chairman: Did you communicate with Mr. MacCracken then?

Colonel Brittin: No, I did not.

The Chairman: How long before you did communicate with him?

90 Colonel Brittin: I sent him a telegram assenting to this.

The Chairman: To what? You assented to this, but you assented how long after you received it?

Colonel Brittin: I presume it must have been within 24 hours.

The Chairman: Do you recall that you assented to it at the time Mr. MacCracken was before the Committee the second time?

Colonel Brittin: I don't recall just when I assented to it, but I wrote a telegram in my office and sent it to Mr. MacCracken.

The Chairman: Now, in the meantime, before you sent the telegram assenting to the request, had you seen Mr. MacCracken?

Colonel Brittin: No, I had not.

The Chairman: You had not seen Mr. MacCracken at his office?

Colonel Brittin: No, I had not.

The Chairman: Did you go to his office?

Colonel Brittin: Yes, sir.

The Chairman: When?

Colonel Brittin: I don't recall just when I was there. It was either Wednesday or Thursday, I think, or maybe before that.

The Chairman: It was after you received the telegram from him, was it not?

91 Colonel Brittin: I am not clear on that, Senator.

The Chairman: Do you not know, Mr. Brittin, that your telegram was sent and reached Mr. MacCracken while he was sitting here testifying the second day, at the very time that he testified that you had already been to his office and had taken some of the files away?

Colonel Brittin: Well, then, that must have been the facts of the case, then.

The Chairman: How did you happen to go to his office?

Colonel Brittin: I just went to his office to inquire for Mr. MacCracken, and he was engaged.

The Chairman: What time of day or night was it?

Colonel Brittin: I think it was in the middle of the day, sometime; it was during office hours.

The Chairman: During the middle of the day?

Colonel Brittin: Well——

The Chairman: Did you see either of those two gentlemen sitting back there, Mr. Brittin?

Mr. Bradley, will you stand up?

(Mr. Bradley arose.)

The Chairman: Did you see him down there?

Colonel Brittin: No.

The Chairman: And you state that you were there in the daytime?

Colonel Brittin: Yes, I was.

92 The Chairman: Did you go into Mr. MacCracken's office?

Colonel Brittin: I went into his office.

The Chairman: Did you go in immediately when you got there?

Colonel Brittin: Yes, I went into his suite of offices. I did not get into Mr. MacCracken's private office.

The Chairman: Whose private office did you go to when you got in?

Colonel Brittin: I went to—Mr. MacCracken was engaged, and I first went to Mr. Lee's office.

The Chairman: Who is Mr. Lee?

Colonel Brittin: He is a partner of Mr. MacCracken, the firm of MacCracken and Lee.

The Chairman: What took place there?

Colonel Brittin: I asked Mr. Lee if I could see the files of the Northwest Airways. I stated to Mr. Lee—I had used his office, I had used the office of MacCracken and Lee as my Washington address last summer, and I felt that some of my personal papers might be mixed up in this Northwest file, and that I wanted to take my personal papers out, and he permitted me to see the file. I went through it—it was quite voluminous. I did not examine everything that was in it. It contained a lot of legal opinions on various matters, and I took about half a dozen papers that were purely personal, and turned the file back to MacCracken & Lee.

93 The Chairman: You knew at that time, did you not, Colonel Brittin, because you had already been notified by Mr. MacCracken, that the Senate Committee had requested his files, correspondence, memoranda, et cetera, relating to air mail?

Colonel Brittin: Oh, yes.

The Chairman: You knew that?

Colonel Brittin: I did.

The Chairman: And it was for that reason that you went down to look over the file, was it not?

Colonel Brittin: For the reasons as stated. I went there for the purpose of taking some personal matters which had inadvertently gotten into the Northwest Airways file that had no relation whatever with the matters under consideration.

The Chairman: But you were prompted to go, were you not, by your knowledge of the fact that the Senate Committee had a subpœna outstanding, and that request had been made on you to know whether your company would waive any privilege which Mr. MacCracken might have?

Colonel Brittin: I knew that the files were about to be publicly examined.

The Chairman: And that is the reason that you went down and took part of the file out?

Colonel Brittin: I took six papers out.

The Chairman: What was the reason you went down and took part of them out?

94 Colonel Brittin: The reason I went there, as I stated, was that these were purely personal matters and did not belong in Mr. MacCracken's file.

The Chairman: But the reason you went to get them was that you did not want the Senate Committee to get them?

Colonel Brittin: I did not think they had any relation——

The Chairman (interposing): That was the reason you went, Colonel Brittin, that you did not want the Senate Committee to get those parts of the files?

That was your object, was it not?

Colonel Brittin: It was not so much a matter of the Senate Committee, Senator, as it was a matter of public examination. Those were personal papers.

The Chairman: The thing you wanted to do was to take those files out before the Senate Committee investigators got them?

Colonel Brittin: Before the public examination.

The Chairman: Before the examination by the Senate Committee—that was the object, was it not?

Colonel Brittin: In a broad way, I suppose it was.

The Chairman: You knew that the Senate Committee had sent a subpœna down there, because Mr. MacCracken had notified you, and you had read it in the papers, also, hadn't you?

Colonel Brittin: Yes.

The Chairman: You took those letters out, and
95 what did you do with them?

Colonel Brittin: I took them down to my office and tore them up, as I would any other papers, and threw them in the waste paper basket.

The Chairman: Threw them in the waste paper basket?

Colonel Brittin: Yes.

The Chairman: Did Mr. Lee agree for you to take them out?

Colonel Brittin: Well, the firm of MacCracken & Lee made no objection.

The Chairman: Did he tell you that it was taking papers out that the Senate Committee wanted, or did he protest in any way?

Colonel Brittin: No.

The Chairman: He did not?

Colonel Brittin: No.

The Chairman: Then Mr. Lee agreed for you to take the papers out of the files?

Colonel Brittin: He did not protest, Senator.

The Chairman: He did not protest?

Colonel Brittin: No.

The Chairman: Where did he get that file from?

Colonel Brittin: From the—from the general files of the office.

The Chairman: Where were those general files?

Colonel Brittin: Why, I—I don't know where they
96 were; I don't know where the files of MacCracken & Lee are.

The Chairman: Then Lee went out and got them for you, did he?

Colonel Brittin: He either did that or sent for one of the young ladies in the office.

The Chairman: Do you remember which he did do?

Colonel Brittin: No, I haven't a very clear remembrance of that.

The Chairman: Colonel Brittin, are you sure that you were there in the daytime?

Colonel Brittin: Absolutely, sir.

The Chairman: Which day was it that you were there?

Colonel Brittin: I tried to tell Mr. Patterson the other day, when he called me up there. I am not exactly clear as to what particular day, but I know I was there in his

office during regular working hours, in the middle of the day sometime—some time between eleven o'clock in the morning and probably three o'clock in the afternoon.

The Chairman: Did you talk with anybody about going up and getting them, before you went after them?

Colonel Brittin: No.

The Chairman: Did you have any advice to go get them?

Colonel Brittin: No.

The Chairman: Did any lawyer advise you to go and get them?

97 Colonel Brittin: I would like to say, Senator, in answer to that question, I have not consulted counsel on this matter at all, and I have no lawyer here.

Perhaps, if I had, I would not have done it, because, to me, it was a perfectly natural and obvious thing to do, and I did not think that I was doing anything that would be misinterpreted or misunderstood.

The Chairman: To whom were these letters addressed that you took out?

Colonel Brittin: They were purely personal.

The Chairman: To whom were they addressed?

Colonel Brittin: Some of them were to my secretary.

The Chairman: Where?

Colonel Brittin: In St. Paul.

The Chairman: To whom were the others addressed?

Colonel Brittin: Perhaps one or two telegrams, personal memoranda, and I think a couple of letters to my secretary. My secretary handled my personal correspondence for me.

The Chairman: You had an office at that time in Washington, did you not?

Colonel Brittin: I had just established an office.

The Chairman: Where was that office?

Colonel Brittin: At 1090 National Press Building.

The Chairman: Did you have a stenographer there?

Colonel Brittin: I had just employed a stenographer.

The Chairman: When?

98 Colonel Brittin: I guess about ten days ago—perhaps ten or fifteen days ago.

The Chairman: You have not had an office in Washington until ten days ago?

Colonel Brittin: No, sir; I have never had an office in Washington.

The Chairman: Now, these letters were filed in the Northwest Air Express file, were they not?

Colonel Brittin: Northwest Airways file.

The Chairman: Northwest Airways file, in Mr. MacCracken's office?

Colonel Brittin: They were filed there, but they had no business there.

The Chairman: But they were filed in those files?

Colonel Brittin: They were in the folder.

The Chairman: And the title of that folder was Northwest Airways?

Colonel Brittin: I did not look at the title.

The Chairman: Did you see what else was in that file?

Colonel Brittin: Yes. As I went through the file there were quite a few legal opinions on various matters, a legal opinion on the Kelly Bill, a legal opinion on the Comptroller General's rulings on various air mail matters.

The Chairman: There were quite a few letters,
99 also, reporting the progress being made in an effort to get a contract, were there not?

Colonel Brittin: No, not efforts to get a contract, sir. We have a contract.

The Chairman: There were no letters in there with reference to the conference held at the Postmaster General's office?

Colonel Brittin: Yes, there were letters there—my letters to Mr. Howes, my letters to Mr. Cisler, my letters to various Post Office officials.

The Chairman: Were there letters in there with reference to the conference that was held in Washington at the Postmaster General's office?

Colonel Brittin: Which conference was that, please, sir?

The Chairman: When the question came up about dividing up the air mail map.

Colonel Brittin: I do not think so. If you refer to the conference at which the Postmaster General asked all the air mail lines to attend——

The Chairman (interposing): That is the one.

Colonel Brittin: Which he practically requested us to be there. Would you mind giving me the date of that meeting?

The Chairman: I just wanted to know if you saw any correspondence in the file about it.

Colonel Brittin: No, because I only used Mr. MacCracken's office last summer.

100 The Chairman: Did you look over all the files he had on the Northwest Airways?

Colonel Brittin: No, I simply went through them rather casually, just to pick out whatever personal matters there were.

The Chairman: When were those letters written that you say were personal?

Colonel Brittin: Last summer.

The Chairman: To whom else were they written beside your secretary?

Colonel Brittin: Well, as I stated, there were one or two or three telegrams.

The Chairman: To whom?

Colonel Brittin: Personal memoranda.

The Chairman: To whom were these telegrams sent?

Colonel Brittin: To personal friends of mine, Senator; personal matters.

The Chairman: To whom were they?

Colonel Brittin: Is it necessary to answer that?

The Chairman: I think that is necessary to find out what it was you stated you took out.

Colonel Brittin: These were purely personal matters, and I am perfectly willing to do anything you want me to do, but these are personal things, and I wonder if you want to insist on my answering.

The Chairman: They were not seemingly so very
101 personal if you left them up in the files of Mr. MacCracken.

Colonel Brittin: That is perfectly possible, because, when I used Mr. MacCracken's office I was traveling a great deal. I do not reside here in Washington permanently. My home is in St. Paul.

The Chairman: You did not object to their being in there in their files up to the time the Senate Committee sent down there for them, did you?

Colonel Brittin: No. Mr. MacCracken has advised me on some personal matters.

The Chairman: What is that?

Colonel Brittin: I have talked over with Mr. MacCracken some personal matters. At the time he had advised me on one or two purely legal matters that I discussed with him, and I used his office as an address to receive mail when I was in Washington, and I wrote some personal letters from his office, and in my traveling around they got into his files.

The Chairman: You saw in the paper immediately after Mr. MacCracken testified that he stated that he had turned over some files to you, did you not?

Colonel Brittin: Yes, I read that in the newspapers.

The Chairman: Did you then go to see if you could find those files?

Colonel Brittin: Senator, I want to repeat that the only thing I took out——

102 The Chairman (interposing): I know—you have stated that several times.

Colonel Brittin: The six papers.

The Chairman: But did you then go back and make an effort to find those six papers you say you tore up?

Colonel Brittin: No, because that was the next day.

The Chairman: It was the next day after you tore them up that Mr. MacCracken testified he turned them over to you?

Colonel Brittin: I don't know whether it was the next day or two days after. It was not the same day. Anything I would throw in my waste basket on a certain day, of course, would be taken out and cleaned that night.

The Chairman: You tore them up before you put them in the waste basket?

Colonel Brittin: I just tore them up as I would any papers disposed of in that way.

The Chairman: Why didn't you tear them up in Mr. MacCracken's office?

Colonel Brittin: I don't know. It just wasn't the natural thing to do.

The Chairman: You just took them over to your office and immediately tore them up?

Colonel Brittin: I just took them down to my office and tore them up and threw them in the waste basket.

The Chairman: You knew when you got them out

103 that was what you were going to do, tear them up, didn't you?

Colonel Brittin: I don't think I thought very much about it. I just did it because it was a matter of impulse. There was no plan, or anything. It was a personal matter, and they had no place in his files.

The Chairman: Did you save any of them?

Colonel Brittin: No, because they were all personal and all dealt with matters that had transpired.

The Chairman: You knew when you first got them out of the files in Mr. MacCracken's office that the matters were closed up, did you not?

Colonel Brittin: I don't think I thought very much about it at the time. I just went and took them.

The Chairman: Just went and took them, and went directly back to your office. Was there anyone in your office when you got back?

Colonel Brittin: I don't remember whether my secretary was there or not.

The Chairman: Was there anyone else in your office when you tore them up and threw them away?

Colonel Brittin: I don't recall whether my secretary was present or not.

The Chairman: Did you talk to Mr. MacCracken about it any more?

Colonel Brittin: No, sir.

104 The Chairman: Have you talked to him at all about the files that he had?

Colonel Brittin: No, sir.

The Chairman: It was the day after you tore these papers up, was it not, that you wired him that he was at liberty to turn over the files of the Northwest Airways?

Colonel Brittin: I don't remember whether it was the day after or not, but it was—it followed that.

The Chairman: To make it perfectly clear, it was after you went to the office and got these files out and tore them up that you notified Mr. MacCracken that he was at liberty to turn over the files to the Committee?

Colonel Brittin: My telegram reached him subsequent to that.

The Chairman: And you sent it subsequent to that?

Colonel Brittin: I believe I did.

The Chairman: You know you did, don't you?

Colonel Brittin: I believe I did.

(Witness excused.)

Testimony of J. A. Bradley.

(The witness was duly sworn by the Chairman.)

The Chairman: What are your initials, Mr. Bradley?

Mr. Bradley: J. A.

The Chairman: Are you a post office inspector?

Mr. Bradley: Yes, sir.

ments on the part of the Committee on Naval Affairs. Unless some prior commitment may prevent, I should like very much to have the privilege of having the bill laid before the Senate for consideration on next Monday. I am going to ask unanimous consent to that end in legislative session this afternoon.

Mr. Robinson of Arkansas: I think the request ought to be submitted and considered in legislative session. I move that the Senate proceed to the consideration of legislative business.

The motion was agreed to, and the Senate resumed legislative session.

Construction of Naval Vessels

Mr. Trammell: Mr. President, a House bill relating to the building of the Navy to treaty strength reached the Senate 3 days ago. Two important amendments were placed upon the bill on the floor of the House changing very materially the House text in those particulars from the text of the Senate bill which had previously been reported favorably by the Senate Committee on Naval Affairs.

The Senate committee deemed it advisable that those particular features should be given some consideration and that the bill should not be reported immediately to the Senate without giving any thought or consideration whatever to them or to amendments which had been inserted on the floor of the House. Consequently the Senate committee met day before yesterday. We did not reach any agreement then, but met again yesterday and thought we had reached an agreement as to amendments which we wished to suggest, but had to adjourn over until today when we did, after a session of some 2 hours or more, agree upon the amendments which we desired to submit.

The hearing was necessitated not only because certain Members of the Senate felt that the questions involved were of such importance that they should not be passed over with little or no consideration, but it was also requested of the chairman of the committee that the Navy Department be heard upon those particular features of the

bill. We accorded the Department that courtesy. We tried to give some deliberate thought to those important features, one of which was to make a first step toward trying to eliminate the excessive profits which are made out of shipbuilding, and another of which was to endeavor to submit a provision which would require that construction of the vessels to be authorized under this bill shall be apportioned as much as 50 percent to the Government navy yards and 50 percent to the private shipyards of the country. Those are the problems with which we dealt. For that reason we took several days to report back to the Senate this very important measure and these very important features.

Mr. President, I desire to ask unanimous consent, if that is required, that on Monday, upon the convening of the Senate, the unfinished business may be temporarily laid aside and that the Senate proceed to the consideration of House bill 6604, being the bill providing for the building of the Navy to treaty strength.

The Vice President: Is there objection to the request of the Senator from Florida?

Mr. McNary: Mr. President, I do not object to the consideration of the bill in its proper course. However, I am not going to consent to make it a matter of special privilege on Monday. The program has been arranged for Monday. The able Senator from Arkansas [Mr. Robinson] has announced that we will adjourn this evening so that we may have a morning hour on Monday and probably a call of the calendar. The unfinished business of the Senate at this time is in charge of the Senator from California [Mr. Johnson]. If the opportunity occurs on Monday or Tuesday the Senator from Florida may move to proceed to the consideration of his bill.

For these reasons I object at this time to his request.

The Vice President: Objection is heard.

Mr. Trammell: I renew the request for Tuesday.

The Vice President: The Senator from Florida asks unanimous consent for the consideration of the bill on Tuesday. Is there objection?

Mr. McNary: Mr. President, there is no reason why we should start at this time to ask unanimous consent for bills to be considered at some time in the future. The Senator can pursue the course which should be pursued and with

which he is familiar. I shall object constantly to the request.

The Vice President: The Senator from Oregon objects.

William P. M'Cracken.

Mr. Black: Mr. President, I send to the desk a report from the special committee of the Senate acting under Senate Resolution 349 and ask that it may be read.

The Vice President: The clerk will read the report, as requested.

The Chief Clerk read the report (No. 254), as follows:

President of the Senate and the Senate of the United States, Seventy-third Congress:

Your committee, appointed and selected by the Senate under Senate Resolution No. 349, Seventy-second Congress, second session, reports as follows:

(1) The committee has been engaged in public hearings, and did on the 31st day of January 1934 cause to be served on William P. McCracken, of Washington, D. C., a summons, a copy of which is hereto attached, marked "Exhibit A", and which exhibit is made a part of this report.

(2) The said William P. McCracken has appeared before this special committee, but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air mail contracts.

(3) The said William P. McCracken has not only failed, declined, and refused to bring such correspondence and memorandums to the committee, or to make it available for the committee's use, but has declined in an open session of the Senate committee, room 318, Senate Office Building, held on January 31, 1934, and has again declined at a public session of the committee, held on February 2, 1934, to bring said papers and correspondence to the committee; and the said Mr. McCracken admitted in open session of the special committee hearing on February 2, 1934, that between the date of the serving of the subpena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent.

(4) The said William P. McCracken has based his refusal upon the claim that he is an attorney, and as such attorney has a right to determine for himself whether or not cor-

respondence and memorandums with reference to air mail contracts, or what he designates as private and confidential communications, between himself and air mail operators whom he designates as his clients.

(5) The committee makes a report to this Senate and requests that the Senate, by proper resolution, take such action as the Senate deems wise to bring the said William P. McCracken before the bar of the Senate and to require that William J. McCracken produce papers and correspondence herein set out in order that the committee may have available this material evidence to carry out the duties imposed upon your committee by the terms of the resolution under which it is acting.

Respectfully submitted.

HUGO L. BLACK,
Chairman.

(EXHIBIT A.)

United States of America, Congress of the United States.

To William P. MacCracken, Jr., 1152 National Press Building, Washington, D. C.

Greeting: Pursuant to lawful authority, you are hereby commanded to appear before the Senate Committee on Ocean Mail and Air Mail Contracts of the Senate of the United States, on instanter, 1934 at 12 o'clock 30 p. m., at their committee room, 101 Senate Office Building, then and there to testify what you may know relative to the subject matters under consideration by said committee.

Bring all books of account, bank passbooks, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams relating to air mail and ocean mail contracts.

Hereof fail not, as you will answer your default under the pains and penalties in such cases made and provided.

To J. A. Bradley, L. L. Rittelmeyer to serve and return.

Given under my hand, by order of the committee, this 31st day of January, in the year of our Lord one thousand nine hundred and thirty-four.

HUGO L. BLACK,
Chairman Committee on Ocean Mail and Air Mail Contracts.

Service accepted 12:20 p. m. 1/31/34.
WILLIAM P. MACCRACKEN, JR.

Mr. Black: Mr. President, I should like to add that since this report was drawn up, another fact has come to the attention of the committee which would have been placed in the report if it had been known earlier.

106 1876. Congressional Record—Senate. February 2.

Reference is made in the report to the fact that two files have been removed. Those files, according to the evidence, or those parts of the files, were delivered to one Colonel Brittin, of the Northwest Airways, and Mr. Given, as I understand, who is connected with the Western Air Express. An instanter subpena was issued to these two gentlement to bring that correspondence to the committee. Both of them have appeared at the committee room.

The investigator tells me that Colonel Brittin states that he cannot bring the correspondence because he has already destroyed it, making the claim that there was nothing in it except purely unimportant personal matters—a phrase which the committee has heard before.

The other gentleman appeared and stated that the papers he received had been mailed to New York. Of course, we do not know what will happen to the papers that have been mailed to New York. We assume that probably the gentleman who receives them will recognize, if the others have not, that they are part of the evidence which has been desired by the Senate.

The committee has very reluctantly brought this matter to the Senate after having endeavored to obtain the correspondence it desired without coming to the Senate.

In keeping with the request which has been made, I have a resolution which I send to the desk and ask to have read.

The Vice President: The resolution will be read.

The resolution (S. Res. 169) was read, as follows:

Whereas the select committee of the Senate, elected pursuant to Senate Resolution No. 349, Seventy-second Congress, second session, has submitted a report to the Senate; and

Whereas it appears from such report that William P. McCracken, of Washington, D. C., was on January 31, 1934, duly served with a subpena to appear forthwith before such committee, in Washington, D. C., and then and there to testify relative to subject matters, and to produce specified

files, records, and books, pertinent to the matter under inquiry; and

Whereas it appears from such report that the said William P. McCracken has failed, declined, and refused, in disobedience of such subpena, to produce all files, records, and books; and

Whereas the appearance and testimony and correspondence, records, files, and books are material and necessary in order than the committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary concerning ocean and air mail contracts: Therefore be it

Resolved, That the President of the Senate issue his warrant, commanding the Sergeant at Arms or his deputy to take into custody the body of the said William P. McCracken before the bar of the Senate and to bring with him the correspondence, memorandums, books, files, and records referred to, and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memorandums, books, and files as the Senate may propound, and to keep the said William P. McCracken in custody to await the further action of the Senate.

Mr. Black: I ask unanimous consent for the present consideration of the resolution.

The Vice President: Is there objection? The Chair hears none. The question is on agreeing to the resolution.

Mr. Austin: Mr. President, I wish to make the record clear as to my position in this matter.

I am not persuaded that the law required this witness to obey the subpena, in view of his testimony that the matters which he withheld were communications between him and his professional client with respect to the contracts in connection with which they employed him. Therefore I should not want to have my assent to this resolution interpreted to mean that I assent to that part of the charge upon which the resolution is based, because I believe we are making a precedent here which may guide others in the future.

However, I shall favor the resolution because I regard it a contempt of the Senate of the United States for a witness, pending the decision and action of a Senate special investigating committee upon a question raised by the wit-

ness, to interfere and impede whatever judgment might come out of the consideration of the question he presented by destroying the subject matter.

I merely desire to make this record at the present time.

Mr. White: Mr. President, I desire to say a very brief word about the situation.

I think I am very closely in accord with the views expressed by the Senator from Vermont [Mr. Austin]. The fact is that when this attorney raised the question of privilege, some members of the committee, at least, were in much doubt as to how far that right or that duty of privilege extended; and at the request of some of us—I do not know whether it was at my request or not—the committee gave consideration to the question of privilege. It was pending that consideration of the matter in the committee, before we had reached a settled conclusion as to whether the attorney was or was not obligated to bring the papers before the committee, that some of the papers were permitted to go out of his possession into the hands of his client, and as I now understand, to be ultimately destroyed.

So far as I am concerned, without meaning to express an opinion as to the sound and right principle of law involved, I am free to confess that when this action by the attorney took place I lost in substantial degree my interest in the principle, and I was concerned with the fact that while the matter was under consideration the Senate and the committee of the Senate were, as I viewed it, defied. I am supporting this proceeding because of that, and without intending to indicate my belief or my disbelief as to whether or not there was a privilege.

The Vice President: The question is on agreeing to the resolution.

The resolution was agreed to.

Great Lakes-St. Lawrence Deep Waterway Treaty.

Mr. Lewis: Mr. President, I beg to give notice that on Monday the Chairman of the Foreign Relations Committee, the Senator from Nevada [Mr. Pittman], and I will again ask the Senate to arrive at a date—as immediate a date as possible—for a vote upon the pending treaty that is now under discussion, known as the "St. Lawrence Waterway Treaty."

Mr. Pittman: Mr. President, I simply wish to add to what the Senator from Illinois has stated that no agreement as to the date for a vote has been reached; that he and I are to confer with regard to a date to see whether or not those who are interested in the matter on both sides will sustain us in the matter.

Mr. Lewis: I thought we would submit the matter to the Senate and the Senate itself would agree on a date.

Adjournment to Monday.

Mr. Robinson of Arkansas: I move that the Senate adjourn until 12 o'clock noon on Monday.

The Vice President: The question is on the motion of the Senator from Arkansas.

The motion was agreed to; and (at 4 o'clock and 38 minutes p. m.) the Senate adjourned until Monday, February 5, 1934, at 12 o'clock meridian.

Confirmations.

Executive nominations confirmed by the Senate February 2 (legislative day of January 23), 1934.

To Be Assistant Secretary of Commerce.

Ewing Y. Mitchell.

Registers of Land Offices.

George J. Love to be register of land office at Anchorage, Alaska.

Arthur J. Ewing to be register of land office at Coeur d'Alene, Idaho.

Ira H. Masters to be register of land office at Blackfoot, Idaho.

Thomas F. Corbally to be register of land office at Great Falls, Mont.

Mrs. Mary G. Rose to be register of land office at Carson City, Nev.

William H. Canon to be register of land office at Roseburg, Oreg.

George E. Stone to be register of land office at Spokane, Wash.

107 EXHIBIT I.

United States Senate.

Washington, D. C., February 2, 1934.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate.

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forthwith arrest and take into custody and bring to the bar of the Senate, William P. McCracken, together with the correspondence, memorandums, books, files and records pertinent to the matter under inquiry, in pursuance of the following resolution (Senate Resolution 169) this day agreed to:

"Whereas the select committee of the Senate, elected pursuant to Senate Resolution No. 349, 72nd Congress, 2nd Session, has submitted a report to the Senate; and

"Whereas it appears from such report that *William P. McCracken*, of Washington, D. C., was on January 31, 1934, duly served with a subpœna to appear forthwith before such Committee in Washington, District of Columbia, and then and there to testify relative to subject matters, and to produce specified files, records and books, pertinent to the matter under inquiry; and

"Whereas, it appears from such report that the said *William P. McCracken* has failed, declined and refused in disobedience of such subpœnas, to produce all files, records and books; and

"Whereas the appearance and testimony and correspondence, records, files and books are material and necessary in order that the Committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary, concerning Ocean and Air Mail contracts: Therefore be it

"Resolved, That the President of the Senate issue his warrant, commanding the sergeant at arms or his deputy, to take into custody the body of the said *William P. McCracken* before the bar of the Senate and to bring with him the correspondence, memorandums, books, files and records referred to and then and there to answer such

questions pertinent to the matter under inquiry with
108 reference to facts regarding correspondence, memorandums, books and files as the Senate may propound, and to keep the said *William P. McCracken* in custody to await the further action of the Senate."

Hereof fail not and make due return of this warrant.

In testimony whereof I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this the second day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

Attest:

(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

109 EXHIBIT J.

1934. Congressional Record—Senate. 1943.

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Illinois?

Mr. McCarran: I yield.

Mr. Lewis: May I ask the honorable chairman of the committee or his efficient aid, the Senator from Nevada, should not the case of a lawyer who stands on his right as a lawyer be separated from the cases of others the charges against whom are based on actual conduct, as related by the honorable chairman of the committee, and, if otherwise uncontroverted, are criminal? Should not the action of the lawyer in assuming within his rights to advise his clients be separated and the question before the Senate as to him as a lawyer be as to his good faith in giving the advice rather than have him commingled in the whole proceeding with the others who do not stand on the relationship at all within the law that the counsel does who advises his clients? I ask would it not be better that the case of Mr. MacCracken be separated from the others and he be heard separately on his legal rights as the adviser of his clients?

Mr. McCarran: I will gladly answer the question of the Senator from Illinois.

Mr. Borah: Mr. President——

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Idaho?

Mr. McCarran: I yield.

Mr. Borah: I was simply going to say I do not see how we can separate these cases because one man is a lawyer, for his entire guilt or innocence before this body depends, in my judgment, upon whether he sought this privilege as a lawyer for the purpose of getting time to enable them to destroy these papers. It is all one transaction. In other words, the gravamen of the offense is the destruction of the papers after notice was served upon them to produce the papers, and it is an offense in that whether the papers were properly to be brought before the committee or not, they were not to be destroyed and good faith required that they be presented to the committee. If Mr. MacCracken sought time in order to enable his clients to destroy these papers, he becomes so identified with the transaction that we cannot separate his case as a lawyer from the cases of the others.

Mr. Lewis: Mr. President, I cannot take issue with the statement of the able Senator from Idaho, but what I wish to press upon the members of the committee is that the conduct referred to by the Senator from Idaho is distinctively criminal rather than being a contempt of the Senate; it is a deliberate crime against the statute; but the lawyer's position, as I gather from the statement, is somewhat different. If, as a lawyer, he stood on his rights to advise his clients from an honest belief on his own part that the papers were protected, I feel that that particular part of his conduct as to whether, as a lawyer, he acted in good faith or not in giving advice, ought to be separated from the other cases so that he might be given an opportunity to disclose his privilege and that we may ascertain his rights as a lawyer within the meaning of the law and the procedure that exempts a lawyer from contempt, if, as counsel, he believes in good faith in the advice he has given to his clients.

Mr. McCarran: Mr. President, in answer to the suggestion of the Senator from Illinois——

Mr. Lewis: I am following what I believe to be the Supreme Court of the United States in the case I handed my able friend from Nevada and the chairman of the committee a moment back.

Mr. McCarran: In reply to the suggestion of the learned Senator from Illinois, there can be no difference in this case.

If there were an honest difference in the first instance and Mr. MacCracken had reason to believe that there might even be a doubt as to his action, he might have had a right to stand on privilege, but he destroyed that right, even if he doubted the question, when he destroyed the evidence that was then held under subpœna in his custody, and he placed himself in the same category with those who wanted to obtain that evidence out of his office, of whom Mr. Hanshue was one and Mr. Brittin was another. Not only that, but he placed himself out of the category under the rule when he, as related by the chairman, collected the very evidentiary matter that should be taken from his office. It was not the agent of Mr. Hanshue who selected that evidence; it was Mr. MacCracken himself, according to the testimony, who selected the individual pieces of evidence and permitted them to be taken away from the office. Therefore, if the learned Senator from Illinois says that the act is criminal as to some but that the attorney might claim his privilege because he was an attorney, it is apparent that he divested himself of privilege because of his own actions.

Mr. Lewis: No, Mr. President; I would only say that there was a dual position, one where he declined to give the committee papers on the ground that they were confidential communications, and the other which was a participation in the act described by the Senator from Nevada and referred to by the Senator from Idaho, which, if true, was a crime deliberate and in violation of the statute and apart from the relation of a lawyer to his client.

Mr. Robinson of Arkansas: Mr. President——

The Presiding Officer: Does the Senator from Nevada yield to the Senator from Arkansas?

Mr. McCarran: I yield.

Mr. Robinson of Arkansas: The Senator from Nevada has indicated his purpose to present a resolution under which all questions pertaining to the issues presented in the committee report may be determined in the presence and hearing and with participation on the part of the accused. I am going to suggest that this is not an appropriate time to discuss the guilt or innocence of the accused of contempt or even to determine what facts or circumstances may constitute guilt or innocence of contempt. The proper proceeding now is for the Senate to determine

whether it wishes to take further steps in the matter, and if so, to issue a citation for the parties and bring them before the Senate, when all questions may then be properly determined.

The Vice President: The Senator from Nevada offers a resolution, which will be read.

The resolution (S.Res. 172) was reduced to writing and was read, as follows:

Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts.

The Vice President: Without objection, the resolution is agreed to.

Mr. Black: Mr. President, in view of the fact that this entire matter is to be taken up on the citation which has just been issued with reference to the individuals named, including Mr. MacCracken, I move that insofar as the previous citation is concerned it simply requires him to appear here and give testimony and that he be released from custody under Senate Resolution 169, adopted on Friday last.

The Vice President: Without objection, the motion is agreed to.

Mr. Black: Mr. President, I should like to suggest that the citation be made returnable on Friday if that is satisfactory to the Senator from Arkansas [Mr. Robinson].

Mr. Robinson of Arkansas: That will be satisfactory to me.

Mr. Black: At what hour would the Senator suggest?

Mr. Robinson of Arkansas: At any hour the Senator desires. I would suggest 12 o'clock.

Mr. Black: Very well.

The Vice President: Without objection, the citation will be returnable at 12 o'clock noon on Friday next.

Mr. Black: There is one other matter that has not been disposed of and upon which, in my judgment, action should

be taken. I ask that the papers which were subpenaed and which are now in the custody of the Sergeant at Arms,

110 1944. Congressional Record—Senate. February 5.

be turned over to the Senate committee investigating ocean and air mail contracts.

The Vice President: Is there objection? The Chair hears none, and it is so ordered.

Message from the House.

A message from the House of Representatives, by Mr. Haltigan, one of its clerks, announced that the House had passed a bill (H.R. 7527) making an additional appropriation to carry out the purposes of the Federal Emergency Relief Act of 1933, for continuation of the Civil Works program, and for other purposes, in which it requested the concurrence of the Senate.

Consideration of the Calendar Tomorrow.

Mr. Robinson of Arkansas: Mr. President, I wish to state, pending consideration of the unfinished business which will be laid before the Senate at this time, that I have consulted the Senator from Oregon [Mr. McNary], and with his approval make the following request for unanimous consent: That on tomorrow, after the conclusion of morning business, the Senate proceed to the consideration of unobjected bills on the calendar.

The Vice President: Is there objection? The Chair hears none, and it is so ordered.

Mr. Lewis: Mr. President, may I inquire of the able leader of the majority if the program authorizes me to say to those Senators who were expecting to speak on the treaty that that matter is postponed under the present arrangement?

Mr. Robinson of Arkansas: The unfinished business is Senate bill 752. The Senate may proceed to the consideration of the St. Lawrence Waterway Treaty at any time it chooses to do so. There has been no definite program as to the time when consideration of the treaty shall be resumed. My suggestion is that Senators should be ready to discuss the treaty whenever the occasion arises.

Mr. Lewis: I am anxious to be released a couple of days if that may be arranged.

Mr. Robinson of Arkansas: I have no authority to release anyone. My assumption is that Senators do not desire to stay away from the Senate, but that they desire to stay here and attend upon its business.

Mr. Lewis: The Senator from Illinois merely desired to know whether the legislative business, to the consideration of which we are at this moment proceeding, would occupy a couple of days. If the Senator has no arrangement contemplating such, I am glad to be so informed.

Mr. Robinson of Arkansas: It is impossible to say how long consideration of the pending bill will be continued. There is no agreement, as the Senator well knows, to limit debate on the bill. It is a controversial measure, and for that reason I would not undertake to make a prophecy as to how long its consideration may require.

House Bill Referred.

The bill (H.R. 7527) making an additional appropriation to carry out the purposes of the Federal Emergency Relief Act of 1933, for continuation of the Civil Works program, and for other purposes, was read twice by its title and referred to the Committee on Appropriations.

Limitation of Jurisdiction of United States District Courts.

The Senate resumed the consideration of the bill (S. 752) to amend section 24 of the Judicial Code, as amended, with respect to the jurisdiction of the district courts of the United States over suits relating to orders of State administrative boards.

Mr. Johnson obtained the floor.

Mr. McNary: Mr. President, I suggest the absence of a quorum.

The Vice President: The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

Adams, Ashurst, Austin, Bachman, Bailey, Bankhead, Barbour, Barkley, Black, Bone, Borah, Brown, Bulkley, Bulow, Byrd, Byrnes, Capper, Caraway, Carey, Clark, Connally, Coolidge, Copeland, Costigan, Couzens, Cutting, Davis, Dickinson, Dieterich, Dill, Duffy, Erickson, Fess,

Fletcher, Frazier, George, Gibson, Goldsborough, Gore, Hale, Harrison, Hastings, Hatch, Hatfield, Hayden, Hebert, Johnson, Kean, Keyes, King, La Follette, Lewis, Logan, Lonergan, Long, McAdoo, McCarran, McGill, McKellar, McNary, Metcalf, Murphy, Neely, Norris, Nye, O'Mahoney, Overton, Patterson, Pittman, Pope, Reed, Reynolds, Robinson, Ark.; Robinson, Ind.; Russell, Schall, Sheppard, Shipstead, Smith, Steiwer, Stephens, Thomas, Utah; Thompson, Townsend, Tydings, Vandenberg, Van Nuys, Wagner, Walcott, Walsh, Wheeler, White.

Mr. Lewis: I desire to announce that the Senator from Florida [Mr. Trammell] is necessarily detained from the Senate.

I regret to announce that the Senator from Virginia [Mr. Glass] and the Senator from Oklahoma [Mr. Thomas] are detained from the Senate on account of illness.

The Vice President: Ninety-two Senators have answered to their names. A quorum is present.

Mr. Johnson: Mr. President, the bill which is now before the Senate is brief in its terms, but of very grave importance to the States that have endeavored to regulate public utilities and, finally, to have a determination as to the justice or injustice of rates which have been fixed. I read the bill so it may be followed, and, very briefly then, I shall endeavor to show some of the reasons which have led us to present it to the Senate. The bill reads as follows:

Be it enacted, etc., That the first paragraph of section 24 of the Judicial Code, as amended, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this paragraph, no district court shall have jurisdiction of any suit to enjoin, suspend, or restrain the enforcement, operation, or execution of any order of an administrative board or commission of a State, or to enjoin, suspend, or restrain any action in compliance with any such order, where jurisdiction is based solely upon the ground of diversity of citizenship, or the repugnance of such order to the Constitution of the United States, where such order (1) affects rates chargeable by a public utility, (2) does not interfere with interstate commerce, and (3) has been made after reasonable notice and hearing, and where a plain, speedy, and efficient remedy may be had at law or in equity in the courts of such State."

Sec. 2. The provisions of this act shall not affect suits commenced in the district courts, either originally or by removal, prior to its passage; and all such suits shall be continued, proceedings therein had, appeals therein taken, and judgments therein rendered in the same manner and with the same effect as if this act had not been passed.

The design of the measure is to correct what has become an intolerable evil. Those who are familiar at all with the various commissions which the States have set up for the regulation of public utilities and the determination of their rates will realize from their experience that the process is interminable where not only the State courts may be resorted to by the public utility which questions the decision of the State regulatory commission, but the United States courts may be resorted to as well.

The bill takes no substantive right away from the public utility corporations. It enables, of course, the public utility corporation to pursue its remedy through all the courts of the States and ultimately through the United States Supreme Court itself, but it seeks to put the public utility as a litigant in the same category that citizens of the States would be put under like circumstances.

It would seem, from looking at the record of the various cases that have gone to the court of last resort, as if our public utility corporations maintain a circumlocution office the design of which is to rival, in the matter of finality of fixing of rates by the various States, the celebrated case of Jarndyce against Jarndyce.

The bill comes here not from one State, but it comes from many States of the Union. It has the approval practically of every public utility commission of every State that possesses such a commission. It has the approval, too, of those who have had great trouble and great labor and great expense in endeavoring justly to fix the rates of public utility corporations in the different States of the Union.

I have with me letters from different States, all approving the measure, all begging for the relief. I have one from

111 EXHIBIT K.

United States Senate.

To Chesley W. Jurney,
Sergeant at Arms,
United States Senate:

The undersigned, the President of the Senate, by virtue of the power vested in me, hereby command you to forthwith summon William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to appear before the bar of the Senate in pursuance of the following resolution (S. Res. 172) this day agreed to:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue, to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Jr., after a subpœna had been served upon William P. MacCracken, Jr., as shown by the report of the special Senate committee investigating ocean and air mail contracts."

By a further order of the Senate, the above citation is made returnable on Friday, February 9, 1934, at 12 o'clock noon.

Hereof fail not and make due return of this citation.

In testimony whereof, I have hereunto set my hand and caused to be affixed the seal of the United States Senate, this the 5th day of February, 1934.

(Signed) JNO. N. GARNER,
President of the Senate.

[Seal of the United States Senate.]

Attest:
(Signed) EDWIN A. HALSEY,
Secretary of the Senate.

112 EXHIBIT L.

1934. Congressional Record—Senate. 2209.

transportation system; it would list the great industrial mechanism that has been built up in this country, the

greatest industrial mechanism that the world has even seen; it would list our great agricultural resources.

On the other side of the ledger would be listed the obligation of any society and of any government worthy of the name to assure to every man, woman, and child a decent and a full life. If we will discharge that obligation, if we will balance this greater budget, we will put the operating budget into balance almost at once. Fail to balance it and we can go on with your cheese-paring methods on the regular Budget, but we will never balance it so long as the level of economic activity remains at its present point or goes lower.

This program of necessity requires a tax system which will produce sufficient revenue not to balance the Budget but to maintain Government credit. The tax issue has not been faced yet, but it must be faced, and I hope it will be faced by the Senate at this session of Congress.

We have reached the point, Mr. President, where we must ascertain whether those who give lip service to our present system are willing to pay the price to save it. We must ascertain whether those who have the biggest stake in saving this system are willing to contribute to the Government through graduated income and estate taxes a sufficient revenue to make it possible to carry on these collective expenditures until the war against depression has been won.

To vote down this amendment will bring despair to 4,000,000 men and their dependents who have been lifted up out of the slough of despond and given the chance to resume their places as respected citizens. The defeat of this amendment and the rapid abandonment of civil works which must follow will mean the end of an activity chiefly responsible for averting another collapse.

Investigation of Air and Ocean Mail Contracts—William P. M'Cracken et al.

During the delivery of Mr. La Follette's speech,

Mr. Black: Mr. President——

The Vice President: Will the Senator from Wisconsin yield to the Senator from Alabama for the purpose of enabling him to present an order prescribing the procedure tomorrow?

Mr. La Follette: Certainly; I gladly yield to the Senator for that purpose.

Mr. Black: Mr. President, from the Special Committee to Investigate Air and Ocean Mail Contracts, I report the order which I send to the desk and which I ask the Senate to adopt. It has reference to the proceedings tomorrow in connection with the citations for contempt. I desire to state that the order has been carefully gone over by each individual member of the special committee, and has been unanimously approved by the committee. I request that the order be read, and I ask for its adoption.

The Vice President: The clerk will read the order submitted by the Senator from Alabama.

The legislative clerk read as follows:

Ordered, That in the matter of William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue, on an order to show cause, the mode of procedure and rules shall be as follows:

When the respondents shall present themselves at the bar of the Senate in obedience to the order of February 5, 1934, the Presiding Officer shall address them as follows:

"_____,
"_____,
"_____,
"_____.

"You have been brought before the Senate, by its order, to show cause why you should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Jr., after a subpena requiring the production of such papers, files and memoranda had been served upon William P. MacCracken, Jr., as shown by the report of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts."

The clerk shall then read Senate Report 254, Seventy-third Congress, second session, parts 1 and 2, submitted February 2 and 5, 1934, respectively, and Senate Resolution 172, agreed to February 5, 1934; after which the Presiding Officer shall address to each of the respondents the following question:

"Have you anything to say in excuse or extenuation of your connection with or participation in the matters described in such report and resolution?"

If the respondent shall answer, or fail to answer, they shall continue at the bar of the Senate until all the testimony in the proceedings (if any be adduced) shall be closed and then they shall retire while the Senate in closed executive session deliberates on the case; and when a decision is agreed upon the respondents shall, being previously notified of the time by the Sergeant at Arms or by a written notice left at their office or residence, appear at the bar of the Senate, in open session, and the Presiding Officer shall pronounce to them the decision.

The respondents shall be allowed the assistance of counsel while personally attending at the bar of the Senate, who, subject to the limitations hereinafter set forth, may be heard with respect to any matters charged against said respondents.

Counsel shall be limited to examination of respondents and other witnesses and to argument.

The respondents shall be permitted to summon such witnesses to testify to matters pertinent to the issue as the Senate may think proper.

Counsel for the respondents and members of the Special Committee on Investigation of Air Mail and Ocean Mail Contracts shall be permitted to question respondents and witnesses orally; but no question shall be put by or at the request of any Senator not a member of the committee until completion of the examination by counsel and members of the committee, or by counsel if a witness is called by the Senate, until completion of the examination by the members of the committee.

After the completion of such examination by counsel and the members of the committee, if a Senator other than a member of the committee wishes a question to be put to a respondent or witness the question shall be reduced to writing and put by the Presiding Officer, but if any question put or any testimony offered shall be objected to by any member of the committee or by counsel, the member of the committee or counsel so objecting shall be heard briefly thereon and counsel or any member of the committee shall be heard briefly in reply thereto, after which the matter shall be decided by the Presiding Officer without further debate, unless a Senator or counsel shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or the Presiding Officer may at

his option in the first instance submit any such question to a vote of the Senate.

Counsel for the respondents and Members of the Senate shall, subject to the foregoing limitations, have full opportunity to examine, cross-examine, and reexamine any respondent or witness with respect to any matter raised by any question.

All testimony shall be taken on oath or affirmation.

In all particulars not covered by the foregoing, the proceedings shall be governed by the Standing Rules of the Senate.

Mr. Johnson: Mr. President, I should like to make an inquiry of the Senator from Alabama. At the beginning of the resolution, I observe that a portion of the proceedings are to be had in closed executive session. Would the Senator mind stating the reason for that procedure?

Mr. Black: Mr. President, the evidence is to be taken in open session; the arguments are to be made in open session. The closed session to which the Senator refers is with reference to the deliberations of the Senate after the evidence has been given and the arguments have been heard.

The Senator will recall that this was the method which was followed in connection with the recent impeachment case, and, so far as I know, is the method that has been followed with reference to the deliberations of the Senate in connection with reaching a decision in such cases. That is the reason why it is suggested that this particular portion of the proceedings be held in closed session.

Mr. Johnson: Mr. President, I am not seeking to make any captious objection to the procedure that is suggested, but I did not understand the theory upon which a closed executive session was to be held. I take it, however, now, from what the Senator says, that it is merely for the deliberations subsequently of the Senate?

Mr. Black: It is exactly in line with the ordinary proceeding of a jury after the evidence has been given and the argument has been heard.

The Vice President: Is there objection?

Mr. Norris: Mr. President, I am not going to object or even vote against the proposal. The question I wanted to ask the Senator from Alabama has already been asked by the Senator from California. I only had that in view.

I believe a mistake is being made. I think the deliberations of the Senate ought to be in the open. I think it will demand more respect and more consideration from the people of the country if all our deliberations are in the

113 2210. Congressional Record—Senate. February 8.

open. Unless there is some very good reason to the contrary, I hope the Senator from Alabama will change the order in that respect, although if he does not feel authorized to do so by reason of the action of the committee I shall make no further objection.

Mr. Robinson of Arkansas: Mr. President, taking note of what has just been said by the Senator from Nebraska, I desire to express my opinion that the Senate special committee has acted wisely in incorporating in its order of procedure the provision referred to. If, after the evidence has been submitted and the arguments have been heard, 96 Senators proceed in open session to deliberate upon a decision, there will result, in my judgment, such confusion as will occasion delay and embarrassment and tend to prevent the successful conclusion of the deliberations of the Senate.

It is not contemplated that there shall be any proceedings in closed executive session, except insofar as they relate to the efforts of the Senators, 96 in number, to agree upon a conclusion.

Mr. La Follettee: Mr. President——

The Vice President: Does the Senator from Arkansas yield to the Senator from Wisconsin?

Mr. Robinson of Arkansas. I am glad to yield to the Senator from Wisconsin.

Mr. La Follette: May I ask whether the Senator contemplates that after deliberation in executive session the Senate would then go into open session for the purpose of registering its decision?

Mr. Robinson of Arkansas. Oh, certainly. That is the provision in the order.

Mr. Johnson rose.

Mr. Robinson of Arkansas. The only proceedings in closed session, as contemplated by the arrangement, have reference to the deliberations of the Senate. If a jury, or, for that matter, a board of arbitration, in attempting to reach a conclusion, should hold their proceedings in open

session, there would undoubtedly be influences brought to bear to stimulate obstructions which might prevent agreement.

I yield to the Senator from California.

Mr. Johnson: I was merely going to ask the Senator—and he answered it in the latter part of his statement—if he likened the proceedings to one of trial by jury, where the jury retire and in executive session determine their verdict.

Mr. Robinson of Arkansas. Yes, exactly; and that is the sole effect of the provision in the order to be entered relating to the proceedings of the Senate. All other proceedings are in the open, and properly so. Full opportunity is given not only to representatives of the respondents to ask any questions they desire but also to Senators generally after the members of the committee have had the opportunity of submitting their questions. The reason for that provision suggests itself. It is to avoid the confusion which inevitably arises when a large number of Senators seek to obtain the floor at the same time.

The Vice President: Is there objection to the entering of the order?

Mr. Norris: Mr. President, I want to be heard briefly, not with the intention of trying to change any votes, but for the purpose of leaving the record——

Mr. La Follette: Mr. President, if this is going to lead to any extended debate, I would prefer that the Senator from Alabama should take up the matter when I shall have concluded my remarks.

Mr. Robinson of Arkansas. I do not understand that the Senator from Nebraska expects to prolong the debate.

Mr. Norris: I do not.

Mr. La Follette: I shall be very happy to hear the Senator on the subject, but I would like to conclude my remarks.

Mr. Norris: I will simply say, then, that I am still not convinced—and I believe I can convince any honest man if I had the opportunity to do so—that the proceedings ought to be in the open all the way through.

The Vice President: Is there objection? The Chair hears none, and the order is entered.

Prices and Marketing of Sugar (H. Doc. No. 246)

After the conclusion of Mr. La Follette's speech,

The Vice President laid before the Senate a message from the President of the United States, which was read, referred to the Committee on Finance, and ordered to be printed as follows:

To the Congress:

Steadily increasing sugar production in the continental United States and in insular regions has created a price and marketing situation prejudicial to virtually everyone interested. Farmers in many areas are threatened with low prices for their beets and cane, and Cuban purchases of our goods have dwindled steadily as her shipments of sugar to this country have declined.

There is a school of thought which believes that sugar ought to be on the free list. This belief is based on the high cost of sugar to the American consuming public.

The annual gross value of the sugar crop to American beet and cane growers is approximately $60,000,000. Those who believe in the free importation of sugar say that the 2 cents a pound tariff is levied mostly to protect this $60,000,000 crop and that it costs our consuming public every year more than $200,000,000 to afford this protection.

I do not at this time recommend placing sugar on the free list. I feel that we ought first to try out a system of quotas with the threefold object of keeping down the price of sugar to consumers, or providing for the retention of beet and cane farming within our continental limits, and also to provide against further expansion of this necessarily expensive industry.

Consumers have not benefited from the disorganized state of sugar production here and in the insular regions. Both the import tariff and cost of distribution, which together account for the major portion of the consumers' price for sugar, have remained relatively constant during the past 3 years.

This situation clearly calls for remedial action. I believe that we can increase the returns to our own farmers, contribute to the economic rehabilitation of Cuba, provide adequate quotas for the Philippines, Hawaii, Puerto Rico, and the Virgin Islands, and at the same time prevent higher prices to our own consumers.

The problem is difficult but can be solved if it is met squarely and if small temporary gains are sacrificed to ultimate general advantage.

The objective may be attained most readily through amendment of existing legislation. The Agricultural Adjustment Act should be amended to make sugar beets and sugar cane basic agricultural commodities. It then will be possible to collect a processing tax on sugar, the proceeds of which will be used to compensate farmers for holding their production to the quota level. A tax of less than one-half cent per pound would provide sufficient funds.

Consumers need not and should not bear this tax. It is already within the Executive power to reduce the sugar tariff by an amount equal to the tax. In order to make certain that American consumers shall not bear an increased price due to this tax, Congress should provide that the rate of the processing tax shall in no event exceed the amount by which the tariff on sugar is reduced below the present rate of import duty.

By further amendment to the Agricultural Adjustment Act, the Secretary of Agriculture should be given authority to license refiners, importers, and handlers to buy and sell sugar from the various producing areas only in the proportion which recent marketings of such areas bear to total United States consumption. The average marketings of the past 3 years provide on the whole an equitable base, but the base period should be flexible enough to allow slight adjustments as between certain producing areas.

The use of such a base would allow approximately the following preliminary and temporary quotas:

114 EXHIBIT M.

Washington, D. C., February 9, 1934.

To the Senate of the United States:

On February 6, 1934, I received from the Sergeant at Arms of your honorably body a citation to appear before the bar of the Senate on this 9th day of February, 1934, to show cause why I should not be punished for contempt of the Senate on account of the alleged destruction and removal of certain papers from my files after a subpoena had been served upon me "as shown by the report of the

Special Senate Committee investigating ocean and air mail contracts".

I have the greatest respect for the Senate of the United States and would not knowingly or intentionally commit any act in contempt of its constitutional rights and powers. I am constrained, however, to deny the constitutional right of your honorable body to compel the attendance before its bar of a private citizen of the United States to there show cause why he should not be punished for an alleged past and completed act.

The Supreme Court of the United States has distinctly held that while each House of the Congress has implied power to deal directly with contempt so far as is necessary to preserve and exercise the legislative authority expressly granted, this being a power of self-preservation, a means and not an end, the power does not extend to infliction of punishment, as such. It is, the highest judicial tribunal of our Nation has held, a power to *prevent* acts which in and of themselves, inherently, prevent or obstruct the discharge of legislative duty, and to *compel the doing* of those things which are essential to the performance of the legislative functions. That Court has clearly announced the constitutional principle that punishment for completed acts is exclusively a judicial function, and not a legislative one.

To appear at the bar of the Senate in response to the above mentioned citation would be to give assent to the exercise by your honorable body of powers which do not constitutionally belong to it and to voluntarily aid in permitting it to violate rights guaranteed to me as a citizen of the United States under the Constitution of my country. This I respectfully decline to do.

On January 31, 1934, the Senate Committee on Ocean and Air Mail Contracts by its subpoena commanded me to appear before it "instanter" and to "bring all books
115 of account, bank pass books, cancelled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air mail and ocean mail contracts".

Compliant to that subpœna I appeared before your Committee on the date of its issue and on that date I produced and made available to said Committee, to the best of my ability, knowledge, information and belief, all papers in my possession in any way relating to air mail and ocean

mail contracts, except those which under the law, as I understood it and as I was advised respecting it by counsel whom I had consulted, I was not lawfully at liberty to produce, because of the privilege which attached to them as communications between attorney and clients.

I made known to your Committee the privilege of my clients in good faith and, I repeat, after having sought advice of counsel who at the time had no connection with or interest in the clients of mine whose papers were concerned.

I made known to your Committee the name of every client of mine who had air mail contracts, and the fact that I had no clients who, known to me, had ocean mail contracts. At the Committee's request, immediately following my appearance before it, I communicated with all of my clients, who were concerned, by telegraph, informed them of the subpoena, told them that the Committee had requested me to inquire whether they waived their privilege and authorized me to make the documents available to the Committee, and asked for telegraphic advice of their decision. The telegrams thus sent to my clients were, before they were sent, submitted to your Committee's Chairman and by him approved. A true copy of said telegrams appears in the record of the proceedings before your Committee on February 2, 1934.

On February 1, 1934, I again communicated by telegraph to such of my clients as had not promptly responded to my first telegram and urged them to expedite their decision and their advice to me with respect to their waiving the privilege referred to. A copy of this second telegram also appears in the record of your Committee's proceedings of the 2nd instant.

I recognize the power and right of your Committee to issue the above mentioned subpœna and to compel my attendance before the Committee as a witness, and to compel the production of relevant and material documents, to the extent that I could lawfully produce them without my clients' consent.

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Late in the afternoon of February 2, 1934, the Sergeant at Arms of the Senate took me into custody, compliant to the command of an order or warrant issued by the President of the Senate directed to its Sergeant at Arms, pursuant to Senate Resolution 169 of this session. When said

warrant was served the Senate had adjourned to reconvene on Monday, February 5th, at noon, and my appearance at that time under said warrant was arranged for.

Immediately prior to the service of that warrant I had received from all of my above mentioned clients waivers of their privilege and consent to the production by me of all papers in my possession relating to their air mail contracts. Had those waivers and consents not been communicated to me I would not have been lawfully able to comply with the commands of the aforesaid warrant and would have sought release from arrest thereunder by judicial process. The privilege having been waived and no lawful reason being any longer in existence to require my declining to produce any document called for in the aforesaid subpœna and warrant, I produced all of the same, to the best of my ability, knowledge and belief, under the subpœna's command, and they were taken into the custody of your Sergeant at Arms under the pretended authority of the aforesaid warrant.

The Senate's warrant of February 2, 1934, quoting Resolution 169 adopted that date, set forth that "the appearance and testimony and correspondence, records, files and books" called for by the Committee's subpœna "are material and necessary in order that the Committee may properly execute the functions imposed upon it and obtain information necessary as a basis for such legislation as the Senate may deem necessary". And the command of the warrant was that I be brought before the bar of the Senate together with "the correspondence, memorandums, books, files and records referred to and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memorandums, books and files as the Senate may propound."

The privilege above referred to having been waived by those who alone had the power to waive it, I recognized
117 that the legislative purpose declared by, and the inquiries sought to be had as set forth in, the above quoted portions of the Senate's warrant, were within the constitutional power of your honorable body, and I was ready to appear and to submit to whatever examination the Senate deemed appropriate in the premises.

I do not deny, but freely concede, the right and power of the Senate, or its committees thereunto authorized, to com-

pel the attendance of witnesses, the giving of pertinent testimony, and the production of material documents. Likewise, and as freely, I concede the Senate's power to commit a recalcitrant witness to custody until, but no longer than, he agrees to, and does, testify or produce documents as lawfully required.

With the assistance of counsel I had prepared, and was ready to deliver to the Senate at its bar on the 5th instant, the following response:

"Washington, D. C., February 5, 1934.

"Statement of William P. Mac Cracken, Jr., to the Senate of the United States in Response to Warrant of February 2, 1934.

"Mr. President:

"As stated in the report of your Committee appointed under Senate Resolution No. 349, 72nd Congress, Second Session, there was served on me January 31, 1934, subpœna, copy of which is attached to the Committee's report, marked Exhibit A, which copy is printed on page 1875 of the Congressional Record, proceedings of February 2, 1934.

"In response to that subpoena I appeared as a witness before the Senate Committee on Ocean Mail and Airmail Contracts and offered to produce for the examination and use of that Committee all documents in my possession relating to ocean and airmail contracts which under the law, as I understand it, I was then at liberty to produce.

"I am an attorney at law; as such I was retained by several corporations having contracts with the United States for the carriage of mail by airplanes. Among the papers relating to airmail contracts in my possession were communications from my clients to me. I understand the law to be that an attorney cannot produce or disclose any communication, relating to the matter in connection with which he is employed, made to him by a client. I understand further that this is not a privilege of the attorney, but a restriction upon him; that the privilege belongs exclusively to the client. I respectfully so informed the Committee. At the Committee's request I communicated with all of my clients concerned by telegraph, informed them of the subpœna, told them the Committee had requested me

to inquire whether they waived their privilege and authorized me to make the documents available to the Committee, and asked for telegraphic advice of their decision. The telegrams thus sent to my clients were, before they were sent, submitted to your Committee's Chairman and by him approved.

"My files were not subpœnaed. Nor were my office files. Nor was any subpœna issued for all of the papers in, or the entire contents of, my files. I have no such thing in my office as an airmail or ocean mail contract file. Folders in my firm's files which pertain to the business of clients
118 who have or have had airmail contracts frequently contain papers in no way relating to the subject of such contracts. Before replying to my request for instructions regarding the production of papers relating to air mail contracts, which the Committee's subpœna called for, three of my clients requested an opportunity to examine the files containing such papers.

"One of these requests did not come to me and I had no knowledge of it until after it had been made and acted upon by my partner. As to each of these requests the facts are as follows:

"1. One made by Colonel L. H. Brittin of the Northwest Airways, Inc., did not come to me nor did I have any knowledge of it until after it had been made and acted upon. Colonel Brittin had used my firm's office last summer for his own purposes and had while there, I am informed, dictated several personal letters, which, I am further informed, had no relation to air mail and ocean mail contracts. I have no personal knowledge respecting such papers and therefore speak of them on information. Before answering the above referred to request, Colonel Brittin requested my partner to permit him to look at the files and, I am told, took therefrom his personal papers which were in no way affected by or subject to the Senate Committee's subpœna.

"2. Mr. Harris M. Hanshue, President of the Western Air Express, was sent one of the telegraphic requests to which I have referred. Before giving his consent to the production of papers relating to airmail contracts he informed me, by telephone, that he intended to send his secretary to my office to look over the papers in our files and to obtain therefrom some purely personal papers of his.

Subsequent to that telephone message Mr. Gilbert Givven, Mr. Hanshue's secretary, telephoned me that he was coming to my office pursuant to Mr. Hanshue's instructions. He came and I saw him personally. I produced for him the files and he took therefrom certain papers. At a hearing before your Committee on the 2nd instant I informed the Committee that I would use my best efforts to have those papers returned and they have since, I am informed, all been produced by Mr. Givven and delivered to your Committee. Through inadvertence, and without my knowledge, I have been informed since the 2nd instant, some papers the contents of which do relate to airmail contracts were included among the papers taken by Mr. Givven as personal papers of Mr. Hanshue. These, and, I am informed and believe, all papers which Mr. Givven took from my office, are, I repeat, now in the possession of your Committee. Immediately after my appearance before the Committee on the 2nd I exerted, as I promised the Committee I would do, my best efforts to have those papers returned.

"3. Mr. Francis Scheetz, general counsel of the Ludington Air Lines, Inc., one of the companies to whom I sent the above referred to telegram, informed me that he felt that his duty to his client required that he should inspect the papers relating to his client before giving his advice as to whether the Company should or should not waive its privilege in connection with those papers. Mr. Scheetz came to my office for that purpose on the 2nd instant. He did not however inspect any of the papers in my office and his Company has consented to their production.

"Prior to the presentation to the Senate of the Committee's report on February 2nd I had received waiver of their privilege from five of nine clients concerned; had communicated that fact to the Committee; had produced all documents comprehended within the description of the Committee's subpœna, under that subpœna, which concerned the clients who had waived their privilege and consented to such production; and had communicated with the four clients who had not answered my earlier telegrams urging them to expedite their decision and instructions to me.

"At about the time that this honorable body ordered the issuance of its warrant, I had received instructions
119 from the four clients who up to the time of my last appearance before the Committee on February 2nd

had not given me instructions, to the effect that they also waived any privilege pertaining to documents in my possession and consenting to my producing the same under the Committee's subpœna. I received the last of these instructions shortly prior to the service by your Sergeant-At-Arms of the warrant. As my clients informed me of their decision in the premises I promptly communicated the same to the Chairman of your Committee and to investigators employed by it.

"There have now been produced, compliant to the command of the Committee's subpœna and the Senate's warrant, to the best of my ability, knowledge and belief, all documents and records in my possession relating to airmail and ocean mail contracts.

"I have twice appeared, compliant to the demand of your Committee's subpœna, before the Committee, and I have never refused to answer any question propounded to me by any member thereof.

"I have the greatest respect for the Senate of the United States and have at no time had any desire to disobey its processes or to appear to be in contempt of its authority.

"There having been produced the documents which the Committee's subpœna and the Senate's warrant commanded the production of, and I having answered all questions propounded to me, and being ready to answer all material and pertinent questions which may be propounded by this honorable body or its Committee, I respectfully ask to be discharged from custody of the Sergeant at Arms of the Senate.

(Signed WILLIAM P. MacCRACKEN, JR."

Although the Sergeant at Arms reported that I was in his custody, I was neither required nor permitted to appear before the bar of the Senate on the 5th instant, but after proceedings were had in the Senate on a report submitted by the Special Committee, I was, by vote of the Senate, ordered to be released from custody, and was thereupon forthwith released.

Your Special Committee had in its possession every document, of which I then had any knowledge, covered by its subpœna. I have at no time refused to answer any question propounded to me by the Committee. As fast as I received waivers, and consents to the production of privileged communications, I advised the Chairman of your Committee

thereof and made available, under the subpœna, all documents which it called for.

Since the 5th instant some few papers relating to air mail contracts of a former client, dating back to matters occurring about seven years ago, have been found and produced for the Committee, under the subpœna.

Not having been discharged from my obligation to again appear as a witness under the Committee's subpœna, but having, as I understand, been only temporarily ex-
120 cused from attendance thereunder, I stand ready at any and all times required to appear and testify fully in respect of any matters pertinent and material to the subject of the Committee's inquiry.

Being advised, and convinced, that the Senate's citation, the proposed trial of myself at its bar, and the assertion of power by it to punish me for an alleged consummated offense, are each and all beyond its constitutional powers, and are, on the one hand, an invasion of the functions delegated by the Constitution exclusively to the judicial power, and, on the other, a plain violation of my constitutional rights, I am, with great regret, forced to deny the now asserted right of your honorable body in the premises, and to seek protection under the Constitution in the Courts.

Yours very respectfully,

WILLIAM P. MacCRACKEN, Jr.

121 Filed February 12, 1934.

In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MacCRACKEN, JR., Petitioner.

Demurrer to Petition.

Now comes the respondent by Leslie C. Garnett, United States Attorney and Harry L. Underwood, Assistant United States Attorney, his attorneys, and demurs to the petition for habeas corpus filed herein, and says that the same is insufficient in law.

LESLIE C. GARNETT,
United States Attorney,
HARRY L. UNDERWOOD,
Assistant United States Attorney.

Points to be argued:

1. On this application for a writ of habeas corpus, the hearing is confined to the single question of the jurisdiction of the tribunal under whose authority the petitioner is held, and the hearing is not in the nature of a writ of error, nor is it intended as a substitute for the functions of a trial court.

2. The petition on its face shows that the Senate was exercising a legislative function in subpœnaing petitioner and requiring him to produce documents before it and, therefore, the jurisdiction of the Senate is undisputed.

3. The Senate, where the particular act interferes with its legislative functions, has power in preservation of its functions, without a resort to judicial proceedings under the general criminal law, to exercise its authority to punish for contempt, even though the act complained of has been committed.

122 In the Supreme Court of the District of Columbia.

Writ of Habeas Corpus.

No. 1714.

In the Matter of the Petition for Writ of Habeas Corpus for WILLIAM P. MACCRACKEN, JR.

The President of the United States to Chesley W. Jurney, or to such other person or persons as may have your petitioner in custody, Greeting:

You are hereby commanded to have the body of William P. MacCracken, Jr., detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable Daniel W. O'Donoghue, one of the Justices of the Supreme Court of the District of Columbia in the United States Courthouse, city of Washington (immediately) after the receipt of this writ, do and receive whatever shall then and there be considered of in his behalf, and have then and there this writ.

ALFRED A. WHEAT.

Witness, The Honorable Chief Justice of said Court the 12" day of February, A. D. 1934.

[SEAL.] FRANK E. CUNNINGHAM,
Clerk.

By HARRY M. HULL,
Assistant Clerk.

Marshall's Return.

Served the within named "Chesley W. Jurney" Personally 2/12/34.

EDGAR C. SNYDER,
U. S. Marshal in and for the District of Columbia,
By J. J. CLARKSON,
Deputy U. S. Marshal.

123 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Order.

Filed Feb. 12, 1934.

The respondent, Chesley W. Jurney, Sergeant at Arms of the Senate of the United States, having produced before the Court the body of the petitioner, William P. MacCracken, Jr., in obedience to the writ of habeas corpus issued herein, this cause came on to be heard on the petition and demurrer of the respondent to the sufficiency thereof, and was argued by counsel for the respective parties herein and submitted to the Court:

Upon consideration whereof, it is by the Court this 12th day of February, 1934,

Ordered that the said William P. MacCracken, Jr., be, and he is hereby, remanded to the custody and control of the respondent and the writ of habeas corpus be, and it is hereby, discharged and the petition dismissed.

DANIEL W. O'DONOGHUE,
Justice.

The petitioner in open Court noted an exception to the foregoing order and said exception was allowed by the Court, and the petitioner in open Court notes an appeal to the Court of Appeals, and the penalty of his bond for costs in said appeal is fixed in the sum of $100.00, or in lieu of said bond he may deposit the sum of $50.00 in the Clerk's Office. Thereupon petitioner, by his counsel, applied to the Court for bail, and said application was denied by the Court. The petitioner, by his counsel, thereupon noted an exception, which was allowed by the Court, to the Court's refusal to grant him bail.

DANIEL W. O'DONOGHUE,
Justice.

124 *Memorandum.*

February 14, 1934.—$50 deposited by F. J. Hogan for petitioner in lieu of bond on appeal.

125 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Assignment of Errors.

Filed February 14, 1934.

Now comes William P. MacCracken, Jr., the petitioner in the above-entitled cause, by his attorneys herein, and says that in the judgment and proceedings in said cause there are manifest errors, and that in its decision and judgment in the above-entitled cause the trial court erred in the following particulars and respects, to wit:

(1) In sustaining the demurrer of the respondent to the petition for writ of habeas corpus.

(2) In declining to discharge petitioner from the custody of respondent upon the writ of habeas corpus.

(3) In discharging the writ of habeas corpus and remanding petitioner to the custody of the respondent.

(4) In dismissing the petition for writ of habeas corpus.

(5) In failing to hold that petitioner was unlawfully restrained of his liberty by respondent in violation of his rights under the Constitution of the United States, and

particularly in violation of Article III, Section 2 thereof; and in violation of the Fourth Amendment thereof, providing that no warrant shall issue except upon probable cause supported by oath or affirmation; and in violation of the Fifth Amendment thereof, and particularly the provision thereof that no person shall be deprived of liberty without due process of law; and in violation of the Sixth Amendment thereof, and particularly the provision thereof that in all criminal prosecutions the accused shall enjoy the right to trial by an impartial jury.

(6) In failing to hold that petitioner was unlawfully restrained of his liberty by appellee in violation of his rights under Article III, Section 2, of the Constitution of the United States, defining the judicial power of the
126 United States, and by an attempted exercise of said judicial power by persons who were not judges or members of the judicial department of the Government to whom the exercise of said judicial power is limited.

(7) In not holding that under the circumstances of the case, the issue of the warrant of arrest and the arrest and detention of petitioner thereunder and the deprivation of his liberty were and each of them was abuse of process.

(8) In not finding and holding that the arrest and detention of petitioner were punitive measures not warranted by or reasonable under the circumstances of the case.

(9) In not ordering the detention of petitioner ended and appellant set at liberty.

(10) In failing to hold that the warrant caused to be issued by the Senate for petitioner's arrest was beyond the Constitutional powers of the Senate.

(11) In failing to hold that the assertion and exercise of power by the Senate in causing the arrest of petitioner were, and each of them was unnecessary and arbitrary, and was an invasion of the rights guaranteed petitioner by the Fifth Amendment to the Constitution of the United States that he should not be deprived of his liberty without due process of law.

(12) In failing to hold that the Senate was without lawful authority under the Constitution and laws of the United States to try or punish petitioner for the alleged offense set forth in Senate Resolution 172.

(13) In not holding that the warrant caused to be issued by the Senate for the arrest of petitioner, and all proceedings thereunder, were illegal and void.

(14) In not holding that the proceedings under Senate Resolution 172 were proceedings within the jurisdiction of the courts, and especially of the Grand Jury and not within the constitutional function of the Senate.

(15) In not holding that the proceedings directed by Senate Resolution 172 were beyond the constitutional powers of the Senate because there was no subject or purpose of legislation avowed thereby and none was
127 disclosed or indicated by the terms thereof, and none was apparent from the subject-matter thereof.

(16) In failing to hold that the Senate was without constitutional and lawful authority to cause the issue of the warrant of arrest under which petitioner was deprived of his liberty.

(17) And for other errors apparent of record.

FRANK J. HOGAN,
EDMUND L. JONES,
Attorneys for Petitioner.

Service of a copy of the foregoing assignment of errors acknowledged this 14th day of February, 1934.

LESLIE C. GARNETT,
Attorney for Respondent.

128 In the Supreme Court of the District of Columbia.

Habeas Corpus.

No. 1714.

In the Matter of WILLIAM P. MACCRACKEN, JR., Petitioner.

Designation of Record.

Filed February 14, 1934.

Now comes William P. MacCracken, Jr., appellant in the above-entitled cause, and designates the parts of the record which he desires to have included in the transcript, said parts being considered sufficient for the determination of the questions raised on appeal, viz:

1. Petition for writ of habeas corpus, together with all exhibits appended thereto and made a part thereof.
2. Writ of habeas corpus.
3. Demurrer of appellee.

4. Order discharging writ, dismissing petition and remanding appellant to custody of appellee, together with notations on foot of said order showing exceptions taken by appellant, and noting of appeal in open court, and fixing of bond or cash deposit in lieu thereof.
5. Memorandum of making cash deposit.
6. Assignment of errors.
7. This designation.

FRANK J. HOGAN,
EDMUND L. JONES,
Attorneys for Petitioner.

I hereby acknowledge, this 14th day of February, 1934, service of a copy of the foregoing designation.

LESLIE C. GARNETT,
Attorney for Respondent.

129 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 128, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, In the Matter of William P. MacCracken, Jr., Habeas Corpus No. 1714, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 14th day of February, 1934.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

By CHAS. B. COFLIN,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 6166. William P. MacCracken, Jr., appellant, vs. Chesley W. Jurney. Court of Appeals, District of Columbia. Filed Feb. 15, 1934. Henry W. Hodges, Clerk.

(4608-C)

Monday, May 7, A.D. 1934

* * * * * * *

No. 6166

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY

The argument in the above-entitled cause was commenced by Mr. Frank J. Hogan, attorney for appellant, and was continued by Mr. Leslie C. Garnett, attorney for appellee, and was concluded by Mr. Frank J. Hogan, attorney for appellant.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6166

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY, APPELLEE

Appeal from the Supreme Court of the District of Columbia

(*Argued May 7, 1934. Decided July 9, 1934*)

Frank J. Hogan and *Edmund L. Jones*, both of Washington, D.C., for appellant.

Leslie C. Garnett, United States attorney, and *Harry L. Underwood*, assistant United States attorney, for appellee.

Before Martin, Chief Justice, and Robb, Van Orsdel, Hitz, and Groner, Associate Justices.

ROBB, *Associate Justice:* Appeal from an order in the Supreme Court of the District, on a petition for writ of *habeas corpus* filed by appellant (hereinafter designated as petitioner) and the demurrer of appellee (hereinafter designated as respondent) thereto, dismissing the petition and remanding petitioner to the custody of respondent.

Since respondent demurred to the petition, the material facts there stated must be taken as true. They are substantially as follows: During the second session of the 72nd Congress the Senate of the United States on February 25, 1933, adopted S.Res. 349, which authorized an investigation of all existing contracts for the

carriage of air and ocean mail. Petitioner is a lawyer and at various times during the past ten years had been employed as such by individuals and corporations engaged in the operation of airplanes over designated routes and otherwise, and had rendered to his clients professional services, some of which related to air-mail contracts, but none of which related to ocean-mail contracts.

On January 31, 1934, there was served on petitioner a *subpoena duces tecum*, issued by the committee of the Senate appointed under the aforesaid S.Res. 349, commanding petitioner to appear before the committee, "instanter, at 12:30 p.m.", and to "bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts."

Under the filing system in petitioner's office in Washington, the file folders containing the correspondence and documents relating to matters in which petitioner was employed by air-mail contractors included papers relating to other matters.

In compliance with the subpoena, petitioner appeared before the committee on January 31, 1934, and advised the committee that he was ready to produce all papers called for in the subpoena, excepting only communications between himself, as attorney, and his clients; that, as petitioner understood the law, communications, whether oral or written, between attorney and client relating to the subject matter of the attorney's employment are privileged; and that it is not within the power of the attorney to waive such privilege, which belongs exclusively to the client. Thereupon petitioner was sworn as a witness and testified, in substance, *inter alia*, to the names of air-mail operators whom he had represented as attorney; that he had never represented anyone having an ocean-mail contract; and testified to the character of services rendered by him to his clients; and to the character of the communications between himself and his clients which he considered privileged.

Thereupon the chairman of the committee inquired of petitioner if he would telegraph to his clients on the subject of the committee's subpoena. Agreeing to this suggestion, petitioner prepared a telegram to each of his clients and submitted the same to the chairman of the committee, who gave his approval thereto. These telegrams petitioner sent forthwith on January 31, to each and every client who at any time, so far as petitioner's knowledge extended, had any air-mail contract or contracts. These telegrams requested the clients to advise petitioner by wire if they would waive their privilege and authorize him to make communications between them, as attorney and client, available to the Senate committee. Thereupon petitioner, as promptly as practicable, produced and made available to the committee all papers of every kind and description in his possession, power, or control, in any way relating to air-mail contracts, except those alleged to be embraced within his client's privilege.

On February 1st petitioner informed the committee that he had been advised by telegraph that certain of his clients had waived the privilege attached to their communications between them and petitioner, and on that date petitioner produced to the committee all papers of those clients relating to air-mail contracts. On the same day, also, petitioner addressed and sent to clients who had not responded to his request telegrams indicating the necessity of immediate reply regarding the waiver of privilege, as the committee had called upon him to give that information the next morning. On the following day (February 2, 1934) petitioner was again called before the committee under the aforesaid subpoena and testified to the receipt of waivers from all but four of his air-mail clients, and that all papers of those clients who had waived their privilege were immediately available to the committee. Petitioner requested additional time to obtain waivers from the four remaining clients. This request was refused, the committee ruling that the privilege asserted by petitioner did not relieve him of the duty of producing all papers and documents required by the subpoena.

Petitioner insisting that he could not waive the privilege attached to the communications passing between him, as an attorney, and his clients without the consent of the clients, the matter was on February 2nd reported to the Senate by the chairman of the committee (Senate Report No. 254, 2d sess., 73d Cong.). The Senate thereupon passed S.Res. 169, 73d Cong., 2d sess., which directed the issuance of a warrant by the President of the Senate to take petitioner into custody and produce him before the bar of the Senate, and commanding petitioner to " bring with him the correspondence, memoranda, books, files, and records referred to and then and there to answer such questions pertinent to the matter under inquiry with reference to facts regarding correspondence, memoranda, books, and files as the Senate may propound ", and to keep petitioner in custody to await the further action of the Senate. The resolution affirmed that the testimony of the petitioner and the production of correspondence, records, files, and books were material and necessary in order that the committee [select committee, elected pursuant to S. Res. 349, 72d Cong., 2d sess.] might properly execute the functions imposed upon it " and obtain information necessary as a basis for such legislation as the Senate may deem necessary concerning ocean- and air-mail contracts."

Thereupon the warrant was issued and petitioner was arrested by respondent (Sergeant at Arms of the Senate) on the afternoon of February 2, 1934. The senate not then being in session, petitioner was paroled in the custody of his counsel, to appear at the bar of the Senate in the custody of respondent at noon on February 5, 1934.

Shortly prior to the service of the warrant on February 2d, petitioner received waivers from all his remaining clients who had not responded to his telegrams. Promptly on receiving such waivers,

petitioner notified the chairman of the committee, and made available to the committee under the command of its subpoena all papers in his possession relating to air-mail contracts.

One of the addresses of petitioner's telegrams of January 31st, 1934, was L. H. Brittin, vice president of Northwest Airways, Inc., by which company petitioner was employed from March to November 1933. On February 1, 1934, Brittin called at the office of the law firm of MacCracken & Lee in Washington, which petitioner was senior partner. Subsequent to the issuance of the subpoena of the Senate committee petitioner had not seen Brittin nor had there been any communication between him and petitioner. Upon the occasion of his call he saw petitioner's partner, and advised Lee that he had received petitioner's telegram; that, as Lee knew, he, Brittin, had on occasions during the summer of 1933 been permitted as an accommodation to use Lee's office, and that while there in the summer he had dictated and had typed letters of an entirely personal nature, having no relation to air-mail contracts, copies of which letters he had permitted to remain in the folder of the firm's files in which their papers relating to the business of the Northwest Airways, Inc., were contained; and that he desired to remove from the files these personal papers. Thereupon Lee handed to Brittin the folder referred to, and in the presence of Lee he removed therefrom five or six papers. Lee did not see the contents of these papers, but was advised by Brittin that they did not relate to air-mail contracts and were exclusively personal to himself. Petitioner had no knowledge whatever either of Brittin's call or what had occurred during that call until after Brittin's departure. On February 3, 1934, Brittin appeared as a witness before the Senate committee, corroborated petitioner's statement, and further testified that the letters he had removed were purely personal and had "no relation whatever to the matters under consideration" by the committee, and that he had destroyed them. Petitioner testified fully before the Senate committee on February 2nd concerning his lack of knowledge of the taking and destruction of papers by Brittin.

Another addressee of petitioner's telegrams of January 31st was Harris M. Hanshue, president of the Western Air Express, New York City, by which company petitioner was employed as attorney from December 1, 1929, to September 1, 1932. On February 1, 1934, Hanshue by telephone informed petitioner that before his company could make its decision on the subject of the waiver, he desired an opportunity to look over the papers contained in petitioner's files and also to examine certain personal papers, not relating to air-mail contracts, copies of which he believed to be in such files; that he was sending to petitioner's office for that purpose Gilbert Givven, known to petitioner as one-time secretary to Hanshue and as Washington representative of the Western Air Express. Thereupon Givven made an appointment to call at petitioner's office, and did call on the afternoon of February 1st. Petitioner permitted an examination of the

file folders by Givven and permitted Givven to take therefrom, to be delivered to Hanshue, certain papers not relating to air-mail contracts. Among these papers removed were some which did relate to that subject, but which petitioner did not recognize at the time of the removal. On petitioner's appearance before the Senate committee on February 2nd he testified fully with respect to these facts. Immediately following his appearance on that date he communicated with the Western Air Express and requested the immediate return of all papers taken by Givven as aforesaid. On February 3d Givven appeared as a witness before the Senate committee and then and there produced each and every paper taken by him from petitioner's office on February 1st. All of these papers were delivered by Givven to the Senate committee, and all have been in the possession of the committee since February 3d and are now in its possession.

On February 5, 1934, petitioner and his counsel appeared at the office of the Sergeant at Arms of the Senate, petitioner being then and there ready to appear at the bar of the Senate in response to the warrant under which he had been arrested and to produce the papers included within the subpoena and to answer such questions pertinent to the matter under inquiry as the Senate might propound. Without being required or afforded an opportunity to appear at the bar of the Senate, petitioner was on that day by resolution of the Senate ordered to be released from custody under S.Res. 169 and under the warrant issued and served on February 2. Thereupon petitioner was released from custody. Prior to his release from custody under S.Res. 169 petitioner had produced and delivered to the Senate committee, " to the best of his ability, knowledge, and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail " contracts, and since February 5, 1934, such papers " have been and now are " in its possession.

On February 5 the Senate adopted S.Res. 172, 73rd Cong., 2nd sess. It provided that a citation issue directing petitioner, and Brittin, Givven, and Hanshue " to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memoranda from the files of William P. MacCracken, Junior, as shown by the report of the special Senate committee investigating ocean- and air-mail contracts." Pursuant to that resolution, on February 6th the citation issued and was served on petitioner by respondent, commanding petitioner to appear before the bar of the Senate on Friday, February 9, 1934, at 12 o'clock noon, to show cause why he should not be punished for contempt on the grounds stated in the resolution.

On February 8 the Senate adopted a mode of procedure and rules for the trial of petitioner at its bar.

Petitioner did not appear at the bar of the Senate on February 9 as directed, but addressed a communication to the Senate, which was read in open session on that day. In this communication peti-

tioner stated in detail the facts relating to his then knowledge of the so-called "Brittin and Givven incidents" and, *inter alia*, said: "To appear at the bar of the Senate in response to the above-mentioned citation would be to give assent to the exercise by your honorable body of powers which do not constitutionally belong to it and to voluntarily aid in permitting it to violate rights guaranteed to me as a citizen of the United States under the Constitution of my country."

Upon the reading of petitioner's communication, the Senate on February 9 ordered the issuance of a warrant and his immediate arrest. The warrant was issued directing the respondent, as Sergeant at Arms of the Senate, forthwith to arrest and take into custody and bring to the bar of the Senate the petitioner for the purpose set forth in S.Res. 172.

On February 12, 1934, respondent, acting under the authority of the warrant, arrested petitioner.

Challenging the constitutional power of the Senate under the stated facts so to arrest and restrain him, petitioner in the court below filed a petition seeking the issuance of a writ of *habeas corpus*. The writ issued; whereupon respondent filed a demurrer to the petition on the ground "that the same is insufficient in law." After hearing, the court below, without opinion, discharged the writ and remanded petitioner to the custody and control of respondent.

Petitioner concedes that S.Res. 169 and the warrant served thereunder were adopted and issued in the performance of a legislative function, but contends that S.Res. 172 and the warrant served thereunder were adopted and issued in the attempted exercise of a judicial function.

It is established law that the two Houses of Congress separately possess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make effective the express powers; that the power of inquiry, with process to enforce it, is an essential and appropriate auxiliary to the exercise of the legislative function. *Marshall* v. *Gordon*, 243 U.S. 521; *McGrain* v. *Daugherty*, 273 U.S. 135; *Sinclair* v. *United States*, 279 U.S. 263.

In the *Marshall case* the question involved was whether the House of Representatives had exceeded its power in punishing as for contempt of its authority a person, not a Member, who had written and sent to the chairman of one of its committees an ill-tempered and irritating letter respecting the action and purposes of the committee. It was ruled that it had.

The *Daugherty case* involved the power of the Senate, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and whether in the case before it the process was being employed to obtain testimony for that purpose. The court determined each issue in the affirmative.

In the *Sinclair case* the court sustained a conviction of the defendant under sec. 102, R.S., for refusing to answer questions propounded to him before a committee of the Senate.

In the *Marshall case* the court observed that the auxiliary power rests upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted." (243 U.S. at p. 541.) The court pointed out that in *Anderson* v. *Dunn* (6 Wheat. 204, 231) the answer to the question as to the extent of the implied power of legislative assemblies to deal with contempt was declared to be "*the least possible power adequate to the end proposed.*" The court then said (243 U.S. at p. 542): "Without undertaking to inclusively mention the subjects embraced in the implied power it is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation; that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." The court further pointed out that in its historical review it had been able to discover "no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, *the penalty or punishment for the refusal remaining controlled by the general criminal law.*" [See secs. 101–104 and 859, Rev. Stat.; secs. 191–194, tit. 2, and sec. 634, tit. 28, U.S.C.] (Italics ours.) The court also said (243 U.S. at pp. 544–545) that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of either House to deal with directly under an implied power to preserve their functions "and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, * * *. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion *how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence;* that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference." (Italics ours.)

But in the *Marshall case*, as in *Kilbourn* v. *Thompson*, 103 U.S. 168 (which involved a contempt proceeding instituted by the House), the Court held that the House had exceeded its power. If controlling limitations or restrictions are disregarded, the decisions in the two cases just alluded to "point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *In re Chapman* [166 U.S. 661] that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry." *McGrain* v. *Daugherty*, 273 U.S. 135, 176.

In the *Marshall case* the court finally stated that the conclusions reached brought about "a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution"; that State constitutions written before the adoption of the Constitution of the United States substituted, for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons, "a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfer with the great guaranties and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted." (243 U.S. at p. 546.)

In the light of the controlling authorities to which we have referred, we come to consider the facts in the present case. As we have already observed, petitioner concedes, as indeed he must, that the Senate was acting within its constitutional limitations down to the adoption of S.Res. 172 and petitioner's arrest thereunder. The stated purpose of S.Res. 169 was to compel the appearance and testimony of petitioner in order that the committee might properly execute the functions imposed upon it and obtain information necessary as a basis for legislation. Petitioner alleges, and the demurrer admits, that, prior to the adoption of S.Res. 172 and petitioner's arrest thereunder, he had produced and delivered to the Senate every paper of every kind and description in his possession or under his control relating in any way to air-mail contracts; that he had appeared as a witness before the Senate committee and answered all questions propounded to him; and that he stands ready to appear before the committee at any time and to answer all pertinent and material questions.

The declared purpose of S.Res. 172 was to command the appearance of petitioner, and Brittin, Givven, and Hanshue to show cause why they should not be punished for contempt of the Senate, "on account of the destruction and removal of certain papers, files, and

memoranda from the files of William P. MacCracken, Junior, after a subpena had been served upon William P. MacCracken, Junior, * * *." The purpose was not the production of documents nor to compel the testimony of a witness. This is made more manifest by the inclusion in the resolution of Brittin, Givven, and Hanshue, who had a part in the removal or destruction of the papers alluded to in the resolution. There is no suggestion that the purpose of this resolution was other than the punishment of the named individuals for the part they had taken in the removal or destruction of papers. While petitioner's act in permitting Givven to take from his files papers covered by the subpoena was ill-advised and well calculated to arouse suspicion, those papers, prior to the adoption of S.Res. 172, had all been returned and delivered to the Senate committee and, as the petition alleges, "are now in its possession." On the facts admitted, petitioner was not responsible for the taking and destruction of papers by Brittin, but, even assuming that he was, his punishment by the Senate would operate "not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience." *Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418. There is no suggestion in the record that at the time of the adoption of S.Res. 172 any further or additional information or papers were in the possession of petitioner and were being withheld. Nor is there any suggestion that other and additional information was required. Indeed, concurrently with the adoption of S.Res. 172, the release of petitioner from custody under S.Res. 169, which in its preamble specifically stated that the testimony and papers of petitioner were necessary in the discharge of the Senate's legislative function, indicates that the necessity therefor had ceased to exist or that the information had been furnished to the Senate. In other words, the Senate thereafter was not seeking, by coercion or otherwise, the furnishing of information through testimony or the production of papers; its inquiry in aid of its legislative function had ended so far as petitioner was concerned. How, then, in reason can it be said (as in the *Marshall case*, 243 U.S. at p. 545) that "there is necessity for repression to prevent immediate recurrence" of the act? Is it not plain that the sole purpose of the Senate in the adoption of S.Res. 172 and petitioner's arrest thereunder was punishment, and punishment as such?

Time and again it has been declared that Congress possesses legislative power in the amplest degree to provide for prosecution and punishment under the criminal law for any and every wrongful act. Secs. 101–104 and 859 of the Revised Statutes were enacted under that power and show plainly that Congress intended thereby "to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry 'more effectually'." *McGrain* v. *Daugherty*, 273 U.S. 135, 168.

Unless there is to be an intermingling of the legislative and judicial power to deal with contempt, thereby rendering it possible in all cases as a matter of legislative power summarily to try one thus accused without subjecting him to the statutory modes of trial provided for criminal offenses, protected by the limitations and safeguards of the Constitution, then we must and do declare that the Senate is without jurisdiction to inflict punishment on the petitioner under S.Res. 172.

The judgment therefore is reversed, and the cause remanded, with directions to discharge petitioner from custody.

Reversed and remanded.

GRONER, *J.:* I am unable to concur in the conclusion reached by the court in this case. I shall state the reasons of my dissent briefly.

The essential facts to an understanding of the case are fully set out in the opinion, and it is not necessary or desirable to repeat them here. The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

The opinion of this court holds, and properly holds, that the Senate had a right to require the production of the documents in question, and likewise, that the Senate had the power to punish petitioner if he refused to produce them; but also holds that since the offense charged against petitioner is not the refusal to deliver, but the doing of an act which made delivery by him impossible, the Senate had no authority to inflict punishment, since punishment in such case would not be coercive but punitive.

The opinion relies upon *Marshall* v. *Gordon* (243 U.S. 521). In that case, as in the others cited in the opinion, the rule is stated to be that in addition to the express powers of Congress under the Constitution in relation to the punishment of its own Members, each House has implied power to punish outsiders for contempts; that this power rests upon the legislative power granted to Congress, and that that which is "reasonably appropriate and relevant to the exercise of a granted power [is] to be considered as accompanying the grant." Speaking of this implied power, the Supreme Court in *Marshall* v. *Gordon* (at p. 541) said the power grows out of the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. "The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end, and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted." It has therefore been decided (*McGrain* v. *Daugherty*, 273 U.S. 135)

that the power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed and, for the same reason, to compel a witness to testify and to punish him for contempt either for refusal to testify or to produce documents—"the right to prevent acts which, in and of themselves, inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel."—But in the opinion of this court this implied power is held not to comprehend also the power to impose punishment for a past act, even though the result is to prevent the discharge of a legislative duty where the effect is to make the legislative purpose futile. The reasoning to support this view, I think, is unsound. I am not unmindful of the fact that *Marshall* v. *Gordon* contains an "argumentative dictum" to support the conclusion; but the facts on which that case rests are wholly different from those present here.

In that case the letter which Marshall published was held not to amount to obstruction. In this case petitioner was cited to appear and show cause why he should not be punished for contempt on account of the destruction and removal, after service of the subpoena, of certain papers, files, and memoranda, which the Senate believed to be necessary in the discharge of its legislative duties. To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. In the investigation then under way, the Senate was proceeding to obtain information in aid of legislation. It demanded the production of certain papers, of which petitioner had possession. Petitioner, when summoned to produce the papers, explained that he could not do so because he had allowed them to be removed by a client. Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be imposed—if at all—by another tribunal? I can think of no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless. In the *Marshall case* the power of the Congress, or of either House, to punish for contempts is said to arise out of the necessity of "self-preservation." That term implies power from within—the intrinsic capacity of self-vindication, and this element

or quality is inherent because without it, the right to do the things necessary to carry out the powers given would be dependent upon extraneous circumstances and outside agencies. Considered in this view, it seems to me to follow that there can be no real self-preservation in a case in which an admitted right is subject to successful challenge in any other tribunal than the one in which the right inheres. Nor am I willing to assent to the proposition, that, because the power is coercive, that is to say, in aid of a pending investigation or of legislation, it is any the less complete or is exhausted by the conclusion of the investigation or the exaggeration of the offense by the offender. To admit such a proposition would seem to me to be altogether destructive of the power.

That the right, as well as the power, is limited by constitutional safeguards for the liberty of the citizen and that it may not be exercised capriciously or arbitrarily, or the power of the courts to inquire into its exercise questioned, is one thing, but it is quite another, that the refusal to do that which there is legislative power to compel can be punished only so long as the recusant remains obdurate from unwillingness to do the thing commanded, and the right is lost in a case in which he puts it beyond his own power to obey. What has just been said is in discussion of the single legal principle involved. The justification or extenuation of the act complained of here has no place in a proceeding of this character, but, considered purely in the one aspect, whether the Senate has the power to punish for contempt where, after service of subpoena requiring the production of records, the person subpoenaed destroys the records, it is no answer, as I think, to say that the act of destruction nullifies the power of punishment inherent in the legislature, and I think it was this which, in the *Marshall case*, Chief Justice White had in mind, when, after noting the instances in which no attempt was made to impose restraint "after it became manifest that there was no room for a legislative judgment"—he said, "where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions, and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power, the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the con-

tinued existence of the interference or obstruction to the exercise of the legislative power."

Much emphasis is laid by petitioner on the words "immediate recurrence", but I think the emphasis misplaced. The language quoted is susceptible, as I think, of only one interpretation, viz., that where the power exists and is exercised, it cannot be destroyed by the act of the person against whom it is asserted, and this, even though the further exertion of the power is obviously not in aid of the particular legislation then under consideration. And so, in my view, while the power is implied as a necessary ingredient to the discharge of the functions of Congress, that is to say, as a means of procuring information in aid of legislation, when properly exerted, it is intrinsic to the discharge of its constitutional duties, which in such cases embrace the power to punish those who obstruct its proceedings both as a corrective to the individual and a deterrent to others.

I think the judgment below should be affirmed.

I am authorized by Judge Hitz to say he concurs in this dissent.

A true copy.
Test:

Clerk, United States Court of Appeals
for the District of Columbia.

Monday, July 9, A.D. 1934

* * * * * * *

No. 6166. April term, 1934

WILLIAM P. MacCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed without costs and that this cause be, and the same is hereby, remanded to the said Supreme Court with directions to discharge petitioner from custody.

Per Mr. Justice ROBB.

July 9, 1934.

Mr. Justice Hitz and Mr. Justice Groner dissent.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

January term, 1934

No. 6166

WILLIAM P. MACCRACKEN, JR., APPELLANT

v.

CHESLEY W. JURNEY, APPELLEE

Praecipe for record

In connection with a petition for a writ of certiorari, the cler will please prepare a transcript of the record in the above-entitle cause, including therein the following:

1. The printed record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. Opinion of the court.
4. The judgment.
5. This designation.
6. Clerk's certificate.

LESLIE C. GARNETT,
United States Attorney, Attorney for Appellee.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Henry W. Hodges, clerk of the United States Court of Appeal for the District of Columbia, do hereby certify that the foregoin printed and typewritten pages numbered from 1 to 123, inclusiv constitute a true copy of the record and proceedings of said Cou of Appeals as designated by counsel in the case of *William P. Mac Cracken, Jr., appellant*, v. *Chesley W. Jurney*, No. 6166, April term 1934, as the same remain upon the files and records of said Cou of Appeals.

In testimony whereof I hereunto subscribe my name and affix th seal of said Court of Appeals, at the city of Washington, this 12t day of July, A.D. 1934.

HENRY W. HODGES,
Clerk of the United States Court of Appeals,
for the District of Columbia.

[SEAL] By MONCURE BURKE,
Deputy Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 193

Order allowing certiorari

Filed October 8, 1934

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE, 1934

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75128—34——1

In the Supreme Court of the United States

OCTOBER TERM, 1934

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

PETITION

Chesley W. Jurney, Sergeant at Arms of the United States Senate, petitioner herein, prays that a writ of certiorari issue in accordance with the provisions of subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938) to review a judgment of the United States Court of Appeals for the District of Columbia, entered July 9, 1934, in a case entitled *William P. MacCracken, Jr., appellant* v. *Chesley W. Jurney, appellee,* No. 6166 (R. 121). That judgment reversed a judgment of the Supreme Court of the District of Columbia, which had discharged a writ of habeas corpus and dismissed the petition upon which the writ had been issued, whereby the said

MacCracken had sought his release from the custody of petitioner, as Sergeant at Arms of the Senate of the United States, by whom he had been arrested pursuant to a warrant issued under a resolution of the Senate (R. 103).

QUESTION PRESENTED

The power of the Senate to arrest and bring before it for punishment a recalcitrant witness, who, after being served with a subpoena requiring him to produce his files touching a subject properly under investigation by the Senate, wilfully secretes or destroys documents in those files, or permits them to be secreted and destroyed.

STATEMENT OF THE CASE

The Senate of the United States on February 25, 1933, adopted Senate Resolution No. 349, 72d Congress, Second Session, directing a special committee to make a full, complete, and detailed inquiry into existing contracts for the carrying of air mail and ocean mail, and to report to the Senate the result of its investigation and its recommendations (R. 14).

The respondent is an attorney at law and represented the Western Air Express, Pan-American Airways, Transcontinental & Western Air, and other corporations interested in air-mail contracts (R. 20–26).

Pursuant to Senate Resolution No. 349, the special committee, on January 31, 1934, issued and

had served on the respondent its subpoena commanding him to appear instanter and to—

> bring all books of account, bank pass books, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts (R. 15).

The respondent appeared before the Senate Committee, but failed to produce any of the papers demanded, justifying his refusal on the ground that they were privileged under the relationship of attorney and client existing between him and those whom he represented (R. 16–26).

However, at the suggestion of the Committee, he sent a telegram to numerous clients, asking if they would waive the privilege claimed and authorize the production of the documents (R. 27, 28). The respondent telegraphed the Western Air Express, of which Harris M. Hanshue was president (R. 8), and asked whether this company would waive the privilege and authorize him to make the files in his possession available to the Committee. On February 1, 1934, Hanshue, by telephone, informed him that before he could decide on the subject of the telegram he desired an opportunity to look over the papers in respondent's files relating to the company's matters and to examine certain personal papers, copies of which be believed were in some of the files, and was sending for that purpose one Gilbert Givven, one-time secretary to Hanshue and the Washington representative of the West-

ern Air Express. That afternoon the said Givven made an appointment and called at the office of respondent, who permitted him to examine the file folders in the office and take therefrom certain papers, some of which related to air-mail contracts (R. 8). On the same day one Brittin, the executive vice president of the Northwest Airways, to whom the respondent had telegraphed, appeared at the office of the respondent but MacCracken being engaged, went to the office of Mr. Lee, his partner, went through the voluminous Northwest files (R. 60) and took six papers out (R. 61). The respondent's partner, Lee, either went out and got the files which were examined with his permission, or sent for them (R. 62). Brittin took these papers down to his office and tore them up and threw them in the waste basket (R. 66).

On February 2, 1934, the respondent was again called before the Committee and interrogated, and thereafter the special committee made a report to the Senate (No. 254), (R. 70) to the following effect: (1) That the committee had caused to be served on the appellant MacCracken a subpoena, as hereinbefore set out; (2) that the said MacCracken had appeared before the committee, "but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air-mail contracts"; (3) that the said MacCracken had not only failed, declined and refused to bring

such correspondence and memorandums to the committee, or to make it available for the committee's use, but had declined in an open session of the Senate Committee on January 31, 1934, and again at a public session of the committee on February 2, 1934, to bring said papers and correspondence to the committee and admitted at said public session of the committee "that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent"; (4) that the said MacCracken based his refusal upon his claim that as an attorney he had the right to determine for himself whether or not the correspondence and memorandums were private and confidential communications.

The committee further requested the Senate to take such action as it deemed wise to bring the said MacCracken before the bar of the Senate and require him to produce the papers and correspondence (R. 70–71).

In response to this report, the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant at Arms to take into custody the said MacCracken before the bar of the Senate, and to bring the correspondence, memorandums, books, and files referred to (R. 72, 73).

This warrant was served upon the respondent on February 2, 1934, and he was paroled in the custody

of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On that date the Senate adopted Senate Resolution No. 172 (R. 80), that the President of the Senate issue a citation directing MacCracken and others to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of MacCracken, after a subpoena had been served upon him, and upon the adoption of this Resolution he was directed to be released from custody under Senate Resolution No. 169.

On February 5, 1934, the President of the Senate issued the citation to the Sergeant at Arms (R. 85) commanding him to summon the said MacCracken to show cause why he should not be punished for contempt (R. 12), and the Sergeant at Arms cited the respondent to appear before the bar of the Senate on February 9, 1934.

The respondent did not appear at the bar of the Senate in response to the citation, but declined to do so, alleging that the Senate was exceeding its constitutional authority in issuing the citation (R. 13, 93–101).

On February 9, 1934, the Senate issued a warrant, directing the Sergeant at Arms to arrest the respondent and bring him before the bar of the Senate to show cause why he should not be punished for contempt (R. 13–14).

On February 12, 1934, the petitioner arrested the respondent and that day the respondent filed in the Supreme Court of the District of Columbia, his petition for a writ of *habeas corpus* (R. 1), which was immediately issued, returnable forthwith (R. 13). In response to this writ the petitioner herein immediately produced the respondent in court and demurred to the petition as insufficient in law on the grounds that the petition for the writ presented only the question of the jurisdiction of the Senate; that the petition showed on its face that the Senate was exercising a legislative function in the proceedings complained of and that the Senate, where an act interferes with its legislative functions has power in preservation of its functions without resort to judicial proceedings to exercise its authority to punish for contempt even though the offending act has been committed (R. 101–102).

The Court, after argument, remanded the appellant to the custody and control of the appellee, discharged the writ, and dismissed the petition (R. 103). On appeal to the United States Court of Appeals for the District of Columbia, that judgment was reversed (R. 121), two justices dissenting. The Court in substance held that the Senate was without jurisdiction to inflict punishment upon MacCracken under its Resolution No. 172, because in its view, his act of disobedience was a completed act and as the Senate's inquiry in aid

of its legislative function had ended so far as MacCracken was concerned, there was no obstruction of that legislative function, but that the Senate was assuming to impose punishment as punishment for the respondent's alleged contempt.

REASONS FOR GRANTING THE PETITION

The reasons relied upon by the petitioner for the issuance of a writ of certiorari and upon which it is believed this petition ought to be granted are:

The case involves a question of much importance affecting the power and authority of the Senate of the United States to deal with a contumacious witness. It is desirable that this question be definitely determined in the interest and for the guidance of the two Houses of Congress in future proceedings and also of those who may be involved, concerned in, or affected by such proceedings.

BRIEF IN SUPPORT OF PETITION

OPINIONS

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals has not been published but appears on pages 109 to 121, inclusive, of the record.

JURISDICTION

The judgment of the Supreme Court of the District of Columbia discharging the writ of habeas corpus and dismissing the petition was entered

February 12, 1934 (R. 103). An appeal therefrom to the Court of Appeals was noted in open court (R. 104). The judgment of the Court of Appeals reversing the judgment of the lower court was entered July 9, 1934 (R. 121). The jurisdiction of this Court is invoked under subsection (a) of Section 240 of the Judicial Code as amended and reenacted by the Act of February 13, 1925 (c. 285, 43 Stat. 936, 938).

STATEMENT OF THE CASE

The Court is respectfully referred to the statement of the case contained in the petition for the writ of certiorari above given.

ARGUMENT

I

RESPONDENT'S REFUSAL TO PRODUCE THE BOOKS AND PAPERS UNDER THE SENATE SUBPOENA IS NO LESS (BUT MORE) A CONTEMPT OF THE SENATE BY REASON OF HIS SUBSEQUENT WILFUL OR NEGLIGENT SECRETION OR DESTRUCTION OF THEM AND THE RIGHT OF THE SENATE TO PRESERVE ITS FULLEST LEGISLATIVE POWER AND PUNISH FOR SUCH CONTEMPT IS NOT AFFECTED BY SUCH DESTRUCTION OR SECRETION

The warrant of arrest (R. 14) directed the Sergeant at Arms to take the respondent into custody and bring him forthwith before the Senate "to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the spe-

cial Senate Committee on Ocean and Air Mail contracts * * *."

These reports, as hereinbefore set out, declared that the respondent had failed, refused, and declined to bring or make available for inspection his correspondence and memorandums relating to air mail, and that he had admitted at a public session of the committee that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail had been removed from his office with his knowledge and consent.

It is thus clear that the removal of the files of correspondence from the respondent's office was but an incident and an aggravation of his contempt of the Senate, and was not the sole act of contempt or a substantive offense for which he was arrested and taken into custody before the bar of the Senate. As stated by Mr. Justice Groner (R. 118):

> The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

"The justification or extenuation of the act complained of here has no place in a proceeding of this character" (Justice Groner's dissenting opinion, R–120), and the facts and arguments presented to

show that the recusant witness attempted to purge himself of his contempt must be presented to the Senate. *Henry* v. *Henkel,* 235 U.S. 219, 229.

The contention made below by the respondent, baldly stated, is that if destruction is added to the refusal to produce the documents, there is no longer an obstruction of the exercise of the legislative power and this puts it beyond the power of the Senate to cite the recusant witness for contempt, and has the same effect as if the Senate had never had the power. This is to destroy the power of the Senate to punish for contempt a witness who refuses to produce documents, because the witness can always destroy or secrete these documents and make it impossible to comply with the demand of the Senate. This proposition, it seems to us, refutes itself, "for to so hold would be to admit the authority and at the same time deny it."

Since the power of the Senate to require the production of documents and to punish for refusal to produce, cannot be doubted (*McGrain* v. *Daugherty,* 273 U.S. 135), the exercise of this authority by the Senate cannot be impaired by the wilful or negligent conduct of the witness in secreting or destroying documents.

II

THE POWER OF THE SENATE TO PUNISH WHEN THE ACT COMPLAINED OF HAS BEEN COMMITTED

The object of the Senate in ordering an investigation of air and ocean-mail contracts was to aid it

in legislating. "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain* v. *Daugherty, supra.* If, however, it can be argued that the Senate caused the arrest of the appellant, not merely for his refusal to produce the required memorandums and papers, but also for his aggravation of this offense in removing or permitting them to be removed and secreted or destroyed, and that the removal or destruction of these papers was a completed act, nevertheless, under the implied power to preserve its functions, and without resort to judicial proceedings under the general criminal law, the Senate has authority to punish, even though the act complained of has been committed when the authority is asserted.

In support of this position we confidently rely upon *Marshall* v. *Gordon,* 243 U.S. 521. There the court in its opinion delineated the extent of the implied power of the House of Representatives to deal with contempts by a non-member. After reviewing cases, it was said, p. 544:

> * * * *that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions,* and therefore without resort to judicial proceedings under the general criminal law, *we are of opinion that authority does not cease to exist because the act complained of had*

> *been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it.* On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine, in the use of legitimate and fair discretion, how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. (*Italics ours.*)

It is clear from this language that the implied power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed, to compel the contumacious witness to testify in order that the legislative functions may be performed, and to punish for contempt the refusal to produce documents which inherently obstructs or prevents the discharge of legislative duty, and *a fortiori* to punish for contempt the obstruction and prevention of the discharge of legislative duty by the destruction of such documents.

It is also settled that the power of a House of Congress to punish for contempt and the statutory enactment which makes such contempt a misdemeanor are not antagonistic and that both Con-

gress and the courts could punish a contumacious witness without subjecting him to jeopardy twice for the same offense. *Re Chapman,* 166 U.S. 661.

Further, there is no distinction in principle between the judicial and the legislative power to summarily punish for contempt. *Toledo Newspaper Company* v. *United States,* 247 U.S. 402. In that case it was held that the principles applicable to the legislative and judicial power to punish summarily are identical, and that the test of the power of the courts is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. The principle being the same, there can be no question that the acts of respondent were in contempt of the Senate and had a direct tendency to obstruct the discharge of its legislative duty.

Both the courts and the Senate are inherently empowered to protect themselves and the function they perform by summary proceeding, the court without a jury and the Senate without resort to judicial proceedings under the criminal law, to vindicate their authority and to deter other like derelictions. *Ex Parte Grossman,* 267 U.S. 87, 111, 117–118.

COMPLETED ACT

It is idle to argue that the powers of the Senate cannot extend to a "completed act." If the power of the Senate to cite for contempt or to punish for a contempt was limited as appellant seeks to limit

it to acts not completed, then the power would cease before there could arise any occasion for its exercise. Refusal of a witness to testify is a "completed act" and gives occasion for the exercise of the power to cite and punish. Respondent admits, as he must, in the light of the many adjudications, that such a refusal warrants the exercise of the power.

Finally, the secretion or destruction of the documents sought by the Senate's subpoena was no more a "completed act" than the refusal of the appellant to testify. The contempt embracing both committed acts was complete when the warrant of arrest was issued. To admit the Senate's power in the one act and deny it in the more aggravated contempt subjects the power of the Senate to preserve its legislative function to the caprice, wilfulness, or malice of the recusant witness and permits such witness to purge himself by making his contempt more offensive. As was said by Mr. Justice Groner in his dissenting opinion (R. 119):

> To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. * * * Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be im-

> posed—if at all—by another tribunal? I can think of no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless.

IMPORTANCE OF THE CASE

This case justifies the granting of the writ of certiorari. The decision of the majority of the Court below that Congress has no inherent power to punish a recusant witness who, in defiance of its subpoena to produce, destroys documents properly sought by it, is squarely in the teeth of the opinion in *Marshall* v. *Gordon, supra*, to the effect that the authority to punish "does not cease to exist because the act complained of had been committed when the authority was exerted."

In the light of this opinion, it is of tremendous importance to Congress, as well as to those citizens affected by investigations of the kind here involved, to have this Court definitely determine

whether the act of the recusant witness in destroying documents under subpoena by Congress, nullifies the power of punishment essential to its self-preservation and inherent in it, and thus effectually annihilates its power to require the production of documents.

CONCLUSION

It is respectfully submitted that the petition for the writ of certiorari should be granted.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for Petitioner.

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Judicial Code, Section 268 24
United States Code, Title 2, Section 194 9

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

No opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the United States Court of Appeals for the District of Columbia appears on pages 109 to 121, inclusive, of the record, and is reported in 72 Fed. (2d) 560.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered July 9, 1934 (R. 121). The petition for certiorari was filed September 1, 1934, and certiorari was

granted October 8, 1934 (R. 123). The jurisdiction of this Court rests on subsection (a) of Section 240 of the Judicial Code, as amended and reenacted by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, U. S. Code, Tit. 28, c. 9, Sec. 347.

QUESTION PRESENTED

The power of the Senate to arrest and bring before it for punishment a recalcitrant witness who, after being served with a subpoena requiring him to produce his files touching a subject properly under investigation by the Senate, wilfully secretes or destroys documents in those files, or permits them to be secreted and destroyed.

STATEMENT OF THE CASE

The Senate of the United States on February 25, 1933, adopted Senate Resolution No. 349, 72d Congress, Second Session, directing a special committee to make a full, complete, and detailed inquiry into existing contracts for the carrying of air mail and ocean mail, and to report to the Senate the result of its investigation and its recommendations (R. 14).

The respondent is an attorney at law and represented the Western Air Express, Pan-American Airways, Transcontinental & Western Air, and other corporations interested in air-mail contracts (R. 20–26).

Pursuant to Senate Resolution No. 349, the special committee, on January 31, 1934, issued and had

served on the respondent its subpoena commanding him to appear instanter and to—

> bring all books of account, bank passbooks, canceled checks, check stubs, deposit slips, papers, memorandums, correspondence, maps, copies of telegrams, relating to air-mail and ocean-mail contracts (R. 15).

The respondent appeared before the Senate Committee, but failed to produce any of the papers demanded, justifying his refusal on the ground that they were privileged under the relationship of attorney and client existing between him and those whom he represented (R. 16–26).

However, at the suggestion of the Committee, he sent a telegram to numerous clients, asking if they would waive the privilege claimed and authorize the production of the documents (R. 27, 28). The respondent telegraphed the Western Air Express, of which Harris M. Hanshue was president (R. 8), and asked whether this company would waive the privilege and authorize him to make the files in his possession available to the Committee. On February 1, 1934, Hanshue, by telephone, informed him that before he could decide on the subject of the telegram he desired an opportunity to look over the papers in respondent's files relating to the company's matters and to examine certain personal papers, copies of which he believed were in some of the files, and was sending for that purpose one Gilbert Givven, one-time secretary to Hanshue and the Washington representative of the Western Air

Express. That afternoon the said Givven made an appointment and called at the office of respondent, who permitted him to examine the file folders in the office and take therefrom certain papers, some of which related to air-mail contracts (R. 8). On the same day one Brittin, the executive vice president of the Northwest Airways, to whom the respondent had telegraphed, appeared at the office of the respondent but, MacCracken being engaged, went to the office of Mr. Lee, his partner, went through the voluminous Northwest files (R. 60), and took six papers out (R. 61). The respondent's partner, Lee, either went out and got the files which were examined with his permission, or sent for them (R. 62). Brittin took these papers down to his office and tore them up and threw them in the wastebasket (R. 66).

On February 2, 1934, the respondent was again called before the Committee and interrogated (R. 27 *et seq.*), and thereafter the special committee made a report to the Senate (No. 254), (R. 70) to the following effect: (1) That the committee had caused to be served on the appellant MacCracken a subpoena, as hereinbefore set out; (2) that the said MacCracken had appeared before the committee, "but has failed, refused, and declined to bring with him to the committee, or to make available for inspection, his correspondence and memorandums relating to air-mail contracts"; (3) that the said MacCracken had not only failed, declined, and refused to bring such correspondence

and memorandums to the committee, or to make it available for the committee's use, but had declined in an open session of the Senate Committee on January 31, 1934, and again at a public session of the committee on February 2, 1934, to bring said papers and correspondence to the committee and admitted at said public session of the committee "that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail has been removed from his office with his knowledge and consent"; (4) that the said MacCracken based his refusal upon his claim that as an attorney he had the right to determine for himself whether or not the correspondence and memorandums were private and confidential communications.

The committee further requested the Senate to take such action as it deemed wise to bring the said MacCracken before the bar of the Senate and require him to produce the papers and correspondence (R. 70–71).

In response to this report, the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant at Arms to take into custody the said MacCracken before the bar of the Senate, and to bring the correspondance, memorandums, books, and files referred to (R. 72, 73).

This warrant (R. 76) was served upon the respondent on February 2, 1934, and he was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934 (R. 10).

On that date the Senate adopted Senate Resolution No. 172, that the President of the Senate issue a citation directing MacCracken and others to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of MacCracken, after a subpoena had been served upon him, and upon the adoption of this Resolution he was directed to be released from custody under Senate Resolution No. 169 (R. 80).

On February 5, 1934, the President of the Senate issued the citation to the Sergeant at Arms (R. 85), commanding him to summon the said MacCracken to show cause why he should not be punished for contempt, and the Sergeant at Arms cited the respondent to appear before the bar of the Senate on February 9, 1934 (R. 11, 12).

The respondent did not appear at the bar of the Senate in response to the citation, but declined to do so, alleging that the Senate was exceeding its constitutional authority in issuing the citation (R. 12, 93–101).

On February 9, 1934, the Senate issued a warrant, directing the Sergeant at Arms to arrest the respondent and bring him before the bar of the Senate to show cause why he should not be punished for contempt (R. 13–14).

On February 12, 1934, the petitioner arrested the respondent (R. 12), and that day the respondent filed in the Supreme Court of the District of Co-

lumbia his petition for a writ of habeas corpus (R. 1), which was immediately issued, returnable forthwith (R. 13). In response to this writ the petitioner herein immediately produced the respondent in court and demurred to the petition as insufficient in law on the grounds that the petition for the writ presented only the question of the jurisdiction of the Senate; that the petition showed on its face that the Senate was exercising a legislative function in the proceedings complained of and that the Senate, where an act interferes with its legislative functions has power in preservation of its functions without resort to judicial proceedings to exercise its authority to punish for contempt even though the offending act has been committed (R. 101–102).

The Court, after argument, remanded the respondent to the custody and control of the petitioner, discharged the writ, and dismissed the petition (R. 103). On appeal to the United States Court of Appeals for the District of Columbia, that judgment was reversed (R. 121), two justices dissenting. The Court in substance held that the Senate was without jurisdiction to inflict punishment upon MacCracken under its Resolution No. 172, because in its view, his act of disobedience was a completed act and as the Senate's inquiry in aid of its legislative function had ended so far as MacCracken was concerned, there was no obstruction of that legislative function, but that the Senate was assuming to impose punishment as punishment for the respondent's alleged contempt.

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SUMMARY OF THE ARGUMENT

1. There can be no question of the power of the Senate to require the production of the documents subpoenaed in this case. *McGrain* v. *Daugherty*, 273 U. S. 135. It is conceded that the subpoena was valid and within the authority of the Senate.

It is undisputed that the respondent, MacCracken, did not comply with the requirements of the subpoena and produce all the papers, files, and documents covered by the subpoena and in his possession or subject to his control at the time the subpoena was served upon him. In clear violation of the mandate of the subpoena, he permitted relevant papers to be taken away, secreted, and destroyed. This was a contempt of the Senate. The fact that respondent put it out of his power to produce the documents does not affect the right of the Senate to punish him for this contempt—indeed, it adds to the contempt—and the fact that some of the papers are thereafter secured by the Senate from others does not purge respondent of his contempt.

2. The power of the Senate to punish does not cease because the act complained of has been committed. This power of the Senate is necessary to enable it to fully perform its legislative function without obstruction and to prevent any hindrance to that function by an unwilling, recalcitrant, or contumacious witness.

To assert that this power ceases when the act of contempt is complete is to withdraw the admitted

power at the very time when its exercise is necessary. *Marshall* v. *Gordon,* 243 U. S. 521.

3. The power of the Senate to punish summarily for contempt is governed by the same principles applicable to the power of the judiciary to punish contempt. The test is the character of the act done and its direct tendency to prevent and obstruct the discharge, in the one case of a legislative, and in the other of a judicial, duty and function. *Marshall* v. *Gordon, supra; Toledo Newspaper Co.* v. *United States,* 247 U. S. 402. Since this power is inherent in the courts and in the Senate (and House of Representatives), the Senate may entertain a proceeding to vindicate its authority and to deter other like derelictions. *Ex parte Grossman,* 267 U. S. 87, 111, 117–118. It is not limited to the statutory remedy provided (U. S. Code, Tit. 2, Sec. 194). Both may be availed of. *Re Chapman,* 166 U. S. 661.

The documents taken by Mr. Brittin from the files in the office of respondent, MacCracken, were not all presented to the Senate. Such of those which recovered after being torn up by Brittin were made available by the efforts and search of investigators of the Post Office Department. Testimony of Post Office Inspector Bradley (Appendix to this brief) contained in a public document (Senate Document No. 162 (Pages 106 to 116), 73d Congress, 2d Session) of which this Court may take judicial no-

tice.[1] *Kennett* v. *Chambers,* 14 How. 38, 47, 48; *Jones* v. *United States,* 137 U. S. 202, 214–216; *Heath* v. *Wallace,* 138 U. S. 573, 583, 584; *Greeson* v. *Imperial Irrigation Dist.,* 59 Fed. (2d) 529, 530, 531.

The assertion that full compliance with the subpoena has been made ignores the facts. Immunity from contempt of the Senate cannot be claimed because an agency of the government has frustrated the attempted total destruction of the papers and saved what otherwise would have been lost, a result in no wise due to respondent. He cannot thereby escape the consequences of this additional contempt of the Senate and its process.

ARGUMENT

I

RESPONDENT'S REFUSAL AND FAILURE TO PRODUCE THE BOOKS AND PAPERS UNDER THE SENATE SUBPOENA WAS CLEARLY A CONTEMPT OF THE SENATE. HIS SUBSEQUENT WILFUL OR NEGLIGENT SECRETION OR DESTRUCTION OF THEM WAS NO LESS, BUT MORE, A CONTEMPT OF THAT BODY, AND THE RIGHT OF THE SENATE TO PUNISH FOR SUCH CONTEMPT IS NOT AFFECTED BY SUCH DESTRUCTION OR SECRETION; NOR DOES THE FACT THAT SOME OF THE PAPERS ARE THEREAFTER SECURED FROM OTHERS PURGE HIM OF HIS CONTEMPT

The respondent concedes, as he must, that the Senate had the power to require the production of

[1] This document is entitled "William P. MacCracken, Jr., et al. Extracts from the Congressional Record containing the Proceedings and order in the case of the *United States* vs. *William P. MacCracken, Jr., et al.,* alleging the Respondents in Contempt of the Senate in connection with a subpoena to produce certain papers before a Special Committee appointed to investigate the awarding of Air and Ocean Mail Contracts."

the documents subpoenaed, and that the inquiry which the Senate, through its committee, was conducting was one which it was empowered to make. Also, necessarily conceded is the power of the Senate to punish for the refusal to produce. These things were settled by this Court in *McGrain* v. *Daugherty*, 273 U. S. 135.

But counsel for respondent persists in this Court in the assertion made, and constantly reiterated, in the courts below that the sole question presented in this case is the right of the Senate to take the respondent into custody with a view to punishing him for the past commission of a completed act.

The predicate for this assertion is the claim that, when the proceedings to punish were entertained, the act of contempt provoking those proceedings "had been undone", and hence could not affect any function of the Senate or its committee (brief in opposition to petition for certiorari, page 4).

We deny both the proposition and the predicate upon which it is rested, and will later show that the Senate's "authority does not cease to exist because the act complained of had been committed", and further, that the act of contempt had not been undone, but that in any event such facts as might be adduced to show that the contempt had been purged must and should have been presented to the Senate.

The respondent was not ordered arrested to show cause why he should not be punished for the de-

struction or secretion of the documents only. The warrant of arrest (R. 14) directed the Sergeant at Arms to take the respondent into custody and bring him forthwith before the Senate "to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things as shown by the reports of the special Senate Committee on Ocean and Air Mail contracts * * *."

These reports, as hereinbefore set out, declared that the respondent had failed, refused, and declined to bring or make available for inspection his correspondence and memorandums relating to air mail, and that he had admitted at a public session of the committee that between the date of the serving of the subpoena and the time of his testimony two certain files of correspondence concerning air mail had been removed from his office with his knowledge and consent.

It is thus clear that the removal of the files of correspondence from the respondent's office was but an incident and an aggravation of his contempt of the Senate, and was not the sole act of contempt or a substantive offense for which he was arrested and taken into custody before the bar of the Senate.

Granted the power of the Senate to require the production of documents and to punish for refusal to produce, which the respondent concedes and about which there can be no doubt since the decision of *McGrain* v. *Daugherty*, 273 U. S. 135, where all the cases are reviewed, the exercise of this

authority by the Senate cannot be impaired by the wilful or negligent conduct of the witness in secreting or destroying documents. We repeat, the right of the Senate to preserve its legislative power by compelling the production of documents is not controverted, nor is its power to punish a witness for contumacy for refusing to produce documents denied.

The contention of the respondent, ~~badly~~ stated, however, is that if destruction is added to the refusal to produce the documents, there is no longer an obstruction of the exercise of the legislative power and this puts it beyond the power of the Senate to cite the recusant witness for contempt, and has the same effect as if the Senate had never had the power. This is to destroy the power of the Senate to punish for contempt a witness who refuses to produce documents, because the witness can always destroy or secrete these documents and make it impossible to comply with the demand of the Senate. This proposition, it seems to us, refutes itself, "for to so hold would be to admit the authority and at the same time deny it."

Furthermore, the contention of the respondent that at the time the contempt proceedings were initiated by the Senate all of the papers of which he had had possession had been returned to the Senate is not borne out by the Public Record. Senate Resolution No. 172 directing the President to issue a citation to MacCracken to show cause why he should

not be punished for contempt was passed February 5, 1934 (R. 11). The papers removed from MacCracken's office had not then been found by the Post Office inspectors. Search for them commenced that evening and concluded the evening of February 6th. Such of these papers as were found, torn up, and later presented to the Senate were not made available by respondent. This cannot inure to his benefit, and the documentary facts refute the assertion of counsel for the respondent (brief in opposition to petition for certiorari, page 4) that the act complained of "prior to the proceedings to punish and the arrest of the citizen had been undone so that it no longer did, or could, affect any proceeding of the Senate or any committee thereof."

It might as well be argued that a witness who refused to testify would not be guilty of contempt if the Senate could and did obtain from another the information desired of the recusant witness.

We insist that the purging must be by respondent; *he* must purge *himself*.

As stated by Mr. Justice Groner in the dissenting opinion below (R. 118):

> The sole question involved on this appeal is the power of the Senate to arrest and bring before it for punishment a private citizen who, after being served with subpoena requiring him to produce his files relating to a matter then properly under investigation, allows documents in the files to be withdrawn so that he cannot comply with the terms of the subpoena.

We confidently submit that the existence of this power is established by *McGrain* v. *Daugherty, supra.*

Any facts or arguments presented on behalf of the respondent going to show that he attempted to purge himself of his contempt must be presented to the Senate, which is the tribunal having jurisdiction of this contempt, and have no place in the habeas corpus proceedings. *Henry* v. *Henkel,* 235 U. S. 219, 229.

II

THE POWER OF THE SENATE TO PUNISH DOES NOT CEASE WHEN THE ACT COMPLAINED OF HAS BEEN COMMITTED

The object of the Senate in ordering an investigation of air- and ocean-mail contracts was to aid it in legislating. "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." *McGrain* v. *Daugherty, supra.*

If, however, it can be argued that the Senate caused the arrest of the respondent, not merely for his refusal to produce the required memorandums and papers, but also for his aggravation of this offense in removing or permitting them to be removed and secreted or destroyed, and that the removal or destruction of these papers was a completed act, nevertheless, under the implied power to preserve its functions, and without resort to judicial proceedings under the general criminal law, the Senate has authority to punish, even

though the act complained of has been committed when the authority is asserted.

In support of this position we confidently rely upon *Marshal* v. *Gordon,* 243 U. S. 521, 61 L. Ed. 881. In that case the Court was called upon to consider whether or not the House of Representatives exceeded its power in punishing for contempt a person, not a member, who had written, published, and sent to the chairman of one of its committees an ill-tempered and irritating letter regarding the action of the committee. In considering this question, it became necessary for the Court, Chief Justice White writing the opinion, to delineate the extent of the implied power of the House to deal with contempts, and to determine if the acts of the nonmember were of such a character as to bring them within the implied power of the House to punish. In determining this question, the Court points out (p. 543) that the legislative history of the exertion of the implied power to deal with contempt by the Senate or House shows, among the principal instances, "contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel."

After reviewing *Anderson* v. *Dunn,* 6 Wheat. 204, *Kilbourn* v. *Thompson,* 103 U. S. 168, and *Re Chapman,* 166 U. S. 661, Chief Justice White then takes up the case of *Kielley* v. *Carson,* 4 Moore, P. C. C. 63, 13 Eng. Reprint 225. In that case Kielley was adjudged guilty of contempt by the House of As-

sembly of Newfoundland for having reproached a member in threatening language. The question was whether the Assembly had the power such as was possessed by both Houses of Parliament in England to adjudicate upon a complaint of contempt or breach of privilege. The case was heard by the Privy Council and it was determined that to the full extent of every measure necessary to secure the free exercise of their legislative functions, the House was justified in acting. The case is further quoted, however, to sustain the position that the power of *punishing anyone for a past misconduct as a contempt of its authority* was by no means necessary for the exercise of its functions by a local legislature, whether representative or not, but the Supreme Court definitely refused to follow this ruling, saying it "would unwarrantedly limit the power of Congress to deal with contempt." Commenting that the English rule was in accord with that recognized by the Supreme Court of the United States in *Anderson* v. *Dunn, supra*, it was said:

> that is, that in virtue of the grant of legislative authority there would be a power implied to deal with contempt insofar as that authority was necessary to preserve and carry out the legislative authority given. *While the doctrine of* Kielley *v.* Carson *was thus in substantive principle the same as that announced in* Anderson *v.* Dunn, *we must not be understood as accepting the application*

> *which was made of the rule to the particular case there in question, since, as we shall hereafter have occasion to show, we think that the application was not consistent with the rule which the case announced, and would, if applied, unwarrantedly limit the implied power of Congress to deal with contempt* (p. 541). (Italics ours.)

Later on in the opinion, after a discussion of instances in which the implied power had been asserted, the Court says (p. 544):

> And this latter statement causes us to say, referring to *Kielley* v. *Carson*, 4 Moore, P. C. C. 63, 13 Eng. Reprint 225, 7 Jur. 137, *that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions,* and therefore without resort to judicial proceedings under the general criminal law, *we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it.* On the contrary, when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject, and therefore there necessarily results from this power the right to determine, in the use of legitimate and fair discretion, how far from the nature and

> character of the act there is necessity for repression to prevent immediate recurrence; that is to say, the continued existence of the inteference or obstruction to the exercise of the legislative power. And of course in such case, as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference. (Italics ours.)

Under this language there can be no doubt that the act of the respondent, in refusing to produce documents, in removing or destroying them, or in consenting to their removal or destruction, is "an act of such a character as to subject it to be dealt with as a contempt." The Senate acquired jurisdiction to act on the subject with the resulting "right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to prevent immediate recurrence." If the act is of such a character as to subject it to be dealt with as a contempt by the Senate, then the exercise of the authority of the Senate is not subject to judicial interference "unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power."

For the purposes of this case, it cannot be assumed that the Senate proposed in its contempt proceedings to deal with the respondent in disre-

gard of discretion or by the mere exertion of arbitrary power, or that the Senate was attempting or intending to try the respondent for any wrongdoing other than the contempt of that body. And in this regard, it is pertinent to point out, as herein shown, that when the citation for contempt, pursuant to Senate Resolution No. 172, was issued on February 5, 1934, the Senate had not received the documents later recovered (February 5 and 6, 1934) by the Post Office Inspectors, which had been torn up and attempted to be destroyed. While the respondent was under arrest by virtue of the warrant of arrest issued February 9, 1934, when the writ of habeas corpus was served on February 12, 1934, the Senate had not acted upon the respondent's case, but was then considering it. Certainly, in these circumstances, it cannot be said that its action was not taken in an endeavor to protect its legislative power from frustration by the misconduct of respondent, and it is also clear that it was in no sense acting arbitrarily or in abuse of its discretion.

PUNISHMENT AS PUNISHMENT

Counsel for the respondent has insisted that the Senate has no constitutional power to administer punishment, as such, to a private citizen for criminal contempt of that body, relying upon the language of Mr. Chief Justice White in *Marshall* v. *Gordon, supra.* The Chief Justice, after saying that from the nature of the power "it is clear that

it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation", immediately clarified this language by saying, "that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." It is clear from this language that the implied power to punish for contempt embraces the power to compel the production of documents in order that the legislative functions may be performed, to compel the contumacious witness to testify in order that the legislative functions may be performed, and to punish for contempt the refusal to produce documents which inherently obstructs or prevents the discharge of legislative duty, and *a fortiori* to punish for contempt the obstruction and prevention of the discharge of legislative duty by the destruction of such documents.

When the power of Congress is applied to the contempt of the respondent in refusing to produce documents and, in order to prevent their production, in secreting or destroying them or permitting them to be secreted or destroyed—acts which clearly justified the exercise of the power of punishment—the power "is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred."

Marshall v. *Gordon, supra,* p. 542. In other words, if the substantive crime of which the recusant witness is guilty is denounced by statute, punishment under such statute must be left to the criminal courts. If, however, the contempt comes within the jurisdiction of the Senate to punish, notwithstanding that it may be denounced as a crime under the statute law, the Senate, "to vindicate its authority and to deter other derelictions", has the power to punish for contempt, but not the power to impose the sentence provided under the statutes for the substantive crime.

This is clear from *Re Chapman,* 166 U. S. 661. In that case there was a charge that Senators were yielding to corrupt influences, and Chapman was subpoenaed to appear before the committee, but refused to answer questions pertinent to the inquiry and was indicted and convicted under the Act of 1857 for such refusal. The Court there sustained the power of either House to conduct investigations and exact testimony from witnesses for legislative purposes, and said while Congress could not divest itself or either of its Houses of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended, nevertheless the statute making the act of Chapman a misdemeanor was constitutional, and both Congress and the courts could punish the contumacious witness without subjecting him to jeopardy twice for the same offense.

This Court, in *Marshall* v. *Gordon, supra,* recognizes this same principle when it calls attention to the distinction "which existed between the legislative power to make criminal every form of act which can constitute a contempt, to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority" (pp. 543–544).

III

THERE IS NO DISTINCTION IN PRINCIPLE BETWEEN THE JUDICIAL AND LEGISLATIVE POWER TO SUMMARILY PUNISH FOR CONTEMPT

This proposition is dealt with in *Toledo Newspaper Company* v. *United States,* 247 U. S. 402, wherein further clarification of the principles in *Marshall* v. *Gordon, supra,* was made by this Court. In that case the City Council of Toledo passed an ordinance in effect providing for three-cent fares on street railways. The creditors of the company filed a bill against the company to enjoin it from obeying the ordinance, on the ground that to do so would confiscate the property which they held in the company and would destroy the franchises the company enjoyed.

Immediately preceding the action of the Court granting a preliminary injunction and while that subject was up for consideration, an attachment for contempt was issued against the newspaper

company and the Editor of the Toledo News-Bee for certain publications concerning the controversy and the action of the court. The court directed the district attorney to present an information for contempt against the newspaper and its editor. The defendants demurred on the ground that the information stated no act within the power of the court to punish for contempt. The court found the defendants guilty under the information and imposed punishment by way of fine. This judgment was affirmed by the Circuit Court of Appeals, and the case was carried to this Court. The first proposition discussed by Chief Justice White was the contention of the appellants that there was a total want of power in the court to treat the matters charged in the information as a contempt and punish it accordingly, as a result of the provision of Section 268 of the Judicial Code to the effect—

> that the power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice.

In discussing this proposition and declaring that the statute "conferred no power and imposed no limitations not already existing" (p. 418), the Chief Justice said that while the Marshall case concerned the exercise of legislative power to deal with contempt—

> the fundamental principles which its solution involved are here applicable to the ex-

> tent that they may not be inapposite because of the distinction between legislative and judicial power (p. 418).

After again analyzing *Marshall* v. *Gordon,* the Court says of the quoted provision of Section 268:

> The provision, therefore, conformably to the whole history of the country, not minimizing the constitutional limitations nor restricting or qualifying the powers granted, by necessary implication recognized and sanctioned the existence of the right of self-preservation; that is, the power to restrain acts tending to obstruct and prevent the untrammeled and unprejudiced exercise of the judicial power given by summarily treating such acts as a contempt and punishing accordingly. The test, therefore, is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty, a conclusion which necessarily sustains the view of the statute taken by the courts below and brings us to the second question (p. 419).

Here this Court holds that the principles applicable to the legislative and judicial power to punish summarily are identical, and says that the test as to the power of the Courts is the character of the act done and its direct tendency to prevent and obstruct the discharge of judicial duty. Measured by this test there can be no question that the acts of the respondent were in contempt of the Senate, and both the refusal to testify and the secretion or removal of the files, or permitting their secre-

tion or removal, had a direct tendency to obstruct the discharge of its legislative duty.

Thus, courts are "inherently empowered to protect themselves and the function they perform by summary proceeding without a jury to punish disobedience of their orders and disturbance of their hearings." *Ex parte Grossman,* 267 U. S. 87, 117–118. So also the Senate is inherently empowered to protect itself and the legislative function it performs by summary proceeding, without resort to judicial proceedings under the general criminal law, "to vindicate [its] authority and to deter other like derelictions." *Ex parte Grossman,* p. 111.

Much reliance has been placed by respondent on the assertion that the act out of which arose the contempt had been undone by the production of all the papers subpoenaed. This assumed fact was given much weight in the majority opinion in the lower appellate court (R. 116, 117), and apparently had great influence with the majority of that court.

The petition for habeas corpus avers that, prior to the adoption of the contempt citation resolution (Res. 172), "petitioner had produced and delivered to the Senate of the United States, * * * to the best of his ability, knowledge, and belief, every paper of every kind and description in his possession, or under his control, relating in any way to air-mail and ocean-mail contracts (R. 11, par. 29).

Counsel for respondent stresses, as does the majority opinion, that the petitioner's demurrer admits the production of all the relevant documents.

We call attention to the fact that the averment of the paragraph of the petition is that "to the best of his ability, knowledge, and belief" petitioner had produced all papers. That is far from an assertion that he had *in fact* produced all. Significant is the use of the word "ability", by which attempted adroitness the pleader endeavors to avoid the grave question of the effect of respondent's action in putting beyond his ability the production of some of the required papers.

Furthermore, by Exhibits "E" and "F" to the petition, it is shown by respondent's own testimony before the Senate Committee that papers had been withdrawn from his files by Mr. Givven and Mr. Brittin (R. 31, 32, 54, 55). Mr. Brittin's testimony is that he tore up the papers which he procured (R. 62, 66). In the light of those exhibits, made a part of the petition for habeas corpus, it is difficult to perceive how the demurrer could be held to admit that *respondent* had produced *all* the subpoenaed papers and documents.

More important, however, is the fact that not all the papers were produced. This is established by the testimony before the Senate of Post Office Inspector J. A. Bradley, contained in Senate Document No. 162, 73d Congress, 2d Session (Appendix to this brief, pages 33 to 54).

That testimony is that Inspector Bradley, with other inspectors, on the evenings of February 5th and 6th, after the citation for contempt had been issued, went through sacks of waste papers in the basement of the National Press Building, sorted out fragments of the papers torn up by Brittin, pieced together such as were found and brought them before the Senate (Appendix, pages 33 to 54). Two especially important parts of that testimony were adduced on redirect examination by Senator Black (pages 49, 50):

> Question. I assume that in bringing those pieces out of there you probably found some pieces of some parts of correspondence that you could not piece up with anything else, did you not?
>
> Answer. Yes, sir. That is the part that he (Mr. Richardson) referred to there.
>
> Question. And that is the best you could get, and you got all you could?
>
> Answer. That is right.
>
> Question. Did you have any other pieces that indicated that you were missing anything of correspondence like that?
>
> Answer. Oh, yes. We were unable to find quite a few pieces to complete the file.
>
> Question. And you brought them back in that way?
>
> Answer. Yes, sir.
>
> Question. Incomplete?
>
> Answer. That is right, sir.

and on recross examination by counsel for Brittin (pages 50, 51):

> Question. Mr. Inspector, how do you account, in this working theory of yours, for what has become of the missing parts of letters you cannot find?
>
> Answer. I just do not account for it, sir. I know that we searched and searched and got everything that we could. It is possible that we overlooked a few little fragments. It is possible that they may have fallen out from a hole in a gunny sack, something like that.
>
> Question. It indicates to your mind, does it not, that between the time of deposit of a torn letter in the waste basket and the time you took it out of the sack part of the letter had been lost, does it not?
>
> Answer. Something happened to part of those letters, because we did not have fragments; and whether in the human equation we overlooked them or whether they were lost in the sack we have no way of knowing.
>
> Question. And the losing of a piece of paper could apply just as well to a complete letter as to a fragment, could it not?
>
> Answer. I presume it could; yes.

Thus, it is clear that not all the papers were completely salvaged.

That this court may properly take judicial notice of public documents is well established. *Kennett* v. *Chambers*, 14 How. 38, 47, 48; *Jones* v. *United*

States, 137 U. S. 202, 214-216; *Heath* v. *Wallace,* 138 U. S. 573, 583, 584; *Greeson* v. *Imperial Irrigation Dist.,* 59 F. (2d) 529, 530, 531.

Matters properly subject to judicial notice are not affected by a demurrer. In such case the demurrer is not taken to admit anything that is contrary to facts of which judicial notice is taken. *Jones* v. *United States, supra; Greeson* v. *Imperial Irrigation Dist., supra; French* v. *Senate,* 146 Cal. 604, 607, 608; *Cooke* v. *Tallman,* 40 Iowa 133, 135. Compare *Kennett* v. *Chambers, supra.*

Since it appears that respondent did not comply with the terms of the Senate Committee's subpoena; that in disregard of the mandate of the subpoena he permitted papers to be taken from his files, it is clear that the Senate had jurisdiction to proceed against him for contempt.

Any facts and arguments in extenuation or mitigation of the contempt must be presented to the Senate and may not be inquired into or considered by the Court in a habeas corpus proceeding. *Henry* v. *Henkel,* 235 U. S. 219, 229.

As was said by Mr. Justice Groner (R. 120), "the justification or extenuation of the act complained of here has no place in a proceeding of this character."

COMPLETED ACT

It is idle to argue that the powers of the Senate cannot extend to a "completed act." If the power of the Senate to cite for contempt or to punish for

a contempt was limited as respondent seeks to limit it to acts not completed, then the power would cease before there could arise any occasion for its exercise. Refusal of a witness to testify is a "completed act" and gives occasion for the exercise of the power to cite and punish. Respondent admits, as he must, in the light of the many adjudications, that such a refusal warrants the exercise of the power.

Finally, the secretion or destruction of the documents sought by the Senate's subpoena was no more a "completed act" than the refusal of the respondent to testify. To admit the Senate's power in the one and deny it in the more aggravated contempt subjects the power of the Senate to preserve its legislative function to the caprice, wilfulness, or malice of the recusant witness and permits such witness to purge himself by making his contempt more offensive. As was said by Mr. Justice Groner in his dissenting opinion (R. 119):

> To say at one moment that the power exists to punish for failure to deliver papers, and then to say that it is lost if the contumacy of the witness results in destruction rather than in deliberate withholding, seems to me to be both inharmonious and absurd. * * * Did this act of petitioner, which made compliance with the subpoena impossible, convert the contempt into an offense for which punishment could only be imposed—if at all—by another tribunal? I can think of

no good reason to suppose it did. The answer, it seems to me, depends upon the question, whether the act complained of tended to obstruct the free exercise by the Senate of its legislative functions. If it did, manifestly it was a contempt of the authority which had a right to require it to be done. To admit this and then to say that, because the nature of the act done made compliance impossible, the authority to impose punishment for the recalcitrancy was lost, appears to me to establish a distinction destructive of the purpose out of which the right arises and to make the power itself impotent and fruitless.

CONCLUSION

It is respectfully submitted that the judgment of the United States Court of Appeals for the District of Columbia was erroneous, should be reversed and that the Supreme Court of the District should be affirmed.

LESLIE C. GARNETT,
United States Attorney,
H. L. UNDERWOOD,
Assistant United States Attorney,
Attorneys for Petitioner.

DECEMBER 1934.

APPENDIX

EXTRACT FROM SENATE DOCUMENT NO. 162, 73RD CONGRESS, 2D SESSION

Mr. BLACK. I will call Mr. Bradley as the next witness.

Testimony of J. A. Bradley

The oath was administered to the witness by the Vice President.

Direct examination by Mr. BLACK:

Question. Will you state your name?

Answer. J. A. Bradley.

Question. Where do you live?

Answer. Lincoln, Nebr.

Question. What is your occupation?

Answer. Post-office inspector.

Question. How long have you been connected with the Post Office Department as an inspector.

Answer. About 7 years.

Question. I will ask if you went to the National Press Building last week in connection with a search for any papers.

Answer. Yes, sir.

Question. When did you go down?

Answer. The evening of Monday, February 5.

Question. Who went with you?

Answer. Inspector R. F. Rittelmeyer.

Question. How do you spell that name?

Answer. R-i-t-t-e-l-m-e-y-e-r; and Clyde Fleming and V. V. Sugg.

Question. Where did you go?

Answer. We went to the basement of the National Press Building.

Question. Did you find any of the waste papers in the basement?

Answer. Yes, sir.

Question. How were they in the basement? In what repository were they?

Answer. They were in a large storage room in the basement, about 300 gunny sacks full of waste paper.

Question. Did you proceed to make a search of those sacks?

Answer. Yes, sir; we made a systematic search of the sacks.

Question. How did you proceed?

Answer. We arranged a temporary table and started in on one end of the accumulation of sacks and proceeded to examine each individual sack right straight through until about 12 o'clock that night.

Question. By that time had you found any papers in connection with air-mail transactions?

Answer. Yes, sir. There were a few papers that came from Colonel Brittin's office at 1090 National Press Building, but they were not of the date for which we were searching. They were as of February 2.

Question. You mean you found the sack as of the date of February 2?

Answer. Yes, sir.

Question. Did you find any others at a later time?

Answer. Yes; the following evening we found others.

Question. What date was that? First, how did you ascertain the date that the papers had been placed in the sack?

Answer. Each stack was dumped, and, of course, we were anxious to find Washington daily newspapers. That is a fairly good indication as to the date. Then we took the envelops showing the postmarks and thereby arrived fairly accurately at the actual date that the trash was taken away from the individual offices.

Question. Did you later find any other papers?

Answer. Yes, sir; the following evening we found quite a few other papers.

Queston. What date did the papers in that sack appear to have been placed in it?

Answer. February 1.

Question. February 1?

Answer. Thursday, February 1; yes, sir.

Question. And the other date at which you had found them was what?

Answer. Friday, February 2.

Question. Friday, February 2?

Answer. Yes, sir.

Question. Outside of the two dates, Thursday, February 1, and Friday, February 2, did you find any other air mail papers of any kind?

Answer. No, sir.

Question. I will ask you to look at the letter which I hand you, dated August 15, 1933, addressed to Mr. Lilly, and see if you can identify that letter.

Answer. Yes, sir; I can.

Question. How do you identify it?

Answer. By my initials on the back of each sheet.

Question. When did you place your initials on the back of each sheet?

Answer. It was at the time these papers were assembled.

Question. Assembled? What do you mean by "assembled?"

Answer. They were all in pieces. They were torn when we obtained them out of the sack, and we got them together, pieced them together, and some of them were initialed at that time and two or three were initialed in Mr. Patterson's office subsequently.

Question. Is the letter which is before you now one of the letters that you assembled from torn pieces of paper?

Answer. Yes, sir.

Question. It appears on each page there to have been put together. Was it torn exactly as shown by these fragmentary pieces?

Answer. Yes, sir; just that way.

Mr. BLACK. I would suggest that that letter should be marked as an exhibit. It has not yet been marked as an exhibit, although reference has been made to it.

The VICE PRESIDENT. Without objection, the letter will be marked "Exhibit A" for the record.

(The paper was marked "Exhibit A.")

By Mr. BLACK:

Question. On the top of that letter is there any pencil memorandum?

Answer. Yes, sir; there is.

Question. What is the pencil memorandum?

Answer. "MacCracken copy."

Question. Was that on the letter when you found it?

Answer. Yes, sir.

Mr. BLACK. We offer that letter now, exhibit A.

By Mr. BLACK:

Question. I send you another letter, which will be marked Exhibit B, dated August 28, 1933, and ask if you can identify that letter?

Answer. Yes, sir; I can.

Question. Where did you get that letter?

Answer. Out of the trash.

Question. Out of which trash?

Answer. Out of the trash the evening of February 6 in the basement of the National Press Building.

Question. In what sack did you find it?

Answer. It was in a sack as of February 1.

Question. In other words, the other papers in there showed you it was February 1?

Answer. Yes, sir.

Mr. BLACK. I will ask that that be marked Exhibit B, and I offer it.

The VICE PRESIDENT. Without objection, it is so ordered.

(The paper was marked "Exhibit B.")

By Mr. BLACK:

Question. I send you a letter dated February 28, 1933, addressed to Mr. K. R. Ferguson, signed "L. H. B.", and ask if you can identify it?—and let it be marked Exhibit C.

Answer. Yes, sir; I can identify it.

Question. Where did you get it?

Answer. In the same place, National Press Building, on the evening of February 6.

Question. In what sack?

Answer. In the same sack that came from the tenth floor as of February 1.

Question. Was it also torn into pieces?

Answer. Yes, sir.

Question. Were all three of these torn into pieces?

Answer. Yes, sir.

Question. And they were assembled by you and those working with you?

Answer. That is right.

Question. At a later date?

Answer. Yes, sir.

Mr. BLACK. We offer that letter in evidence.

The VICE PRESIDENT. Without objection, it will be marked Exhibit C.

(The paper was marked "Exhibit C.")

By Mr. BLACK:

Question. I send you a letter dated August 9, 1933, addressed "My Dear Ben" and signed "L. H. Brittin" and ask if you can identify it? I will let it be marked Exhibit D.

(The paper was marked "Exhibit D.")

Answer. Yes, sir; I can identify it.

Question. Where did you get it?

Answer. In the same sack in the basement of the National Press Building on February 6, in the sack as of February 1 from the tenth floor.

Question. Was it also torn into pieces?

Answer. Yes, sir.

Question. I send you a letter dated August 16, 1933, addressed to "My Dear Mr. Lilly" and signed L. H. Brittin" and ask you to identify it and let it be marked "Exhibit E."

(The paper was marked "Exhibit E.")

Answer. Yes, sir; I can identify it.

Question. What is it?

Answer. It is a letter we found in torn condition the evening of February 6 in the basement of the National Press Building in a sack from the tenth floor as of February 1.

Question. I send you a memorandum marked "Memoranda." Let it be marked "Exhibit F." I ask if you can identify it?

(The paper was marked "Exhibit F.")

Answer. Yes, sir; I identify it.

Question. Where did you get it?

Answer. In the basement of the National Press Building on the evening of February 6 in the sack from the tenth floor of the National Press Building as of February 1.

Question. I send you a copy of a day letter dated August 1, 1933, signed "Brittin", marked "Charge MacCracken & Lee", and ask if you can identify it?

Answer (after examining paper). Yes, sir.

Mr. BLACK. Let it be marked "Exhibit G."

(The paper was marked "Exhibit G.")

By Mr. BLACK:

Question. What is that? Where did you find it?

Answer. The torn fragments of that day letter were found in a sack of trash in the National Press Building on the evening of February 6 taken from a sack from the tenth floor as of February 1.

Question. I send you another letter dated September 28, signed "L. H. B.", addressed to Mr. K. R. Ferguson, and ask if you can identify it? Let it be marked "Exhibit H."

(The paper was marked "Exhibit H.")

Answer. Yes, sir; I can.

By Mr. BLACK:

Question. Where did you get it?

Answer. From a sack of trash in the basement of the National Press Building on the evening of February 6, coming from a sack from the tenth floor as of February 1.

Question. I send you a telegram dated September 19, signed by "Brittin", "Charge MacCracken & Lee", addressed to Mr. A. H. Brown, and ask if you can identify it? Let it be marked with the next exhibit number.

Answer (after examining paper). Yes, sir; I can.

(The paper was marked "Exhibit I.")

By Mr. BLACK:

Question. Where did you find it?

Answer. In a sack of trash in the basement of the National Press Building on February 6, coming from a sack from the tenth floor as of February 1.

Question. I send you another letter dated January 26, to Col. L. H. Brittin, from Mr. John H. Druar, and ask if you can identify it, and state where you found it?

Answer (after examining paper). Yes, sir; I can identify it.

Mr. BLACK. Let it be marked the next exhibit, and offered, also.

(The paper was marked "Exhibit J.")

By Mr. BLACK:

Question. Where did you get it?

Answer. It was found in a sack of trash in the basement of the National Press Building on the evening of February 6, coming from a sack from the tenth floor as of February 1.

Question. I will ask you to look at the remainder of these papers. I shall not offer them at the pres-

ent time, but shall have them identified and turn them over to counsel for Colonel Brittin. See if you can identify each one of them.

(The witness examined the papers.)

Mr. BLACK. While that is being done, Mr. President, if I did not make the statement in each instance that I offered the papers in evidence, I do now offer each of the previous exhibits in evidence.

The VICE PRESIDENT. They are offered and marked as exhibits according to the letters suggested by the Senator from Alabama.

Does the Senator desire these to be also offered in evidence?

Mr. BLACK. I am simply having them identified and shall ask some questions and then turn them over to counsel in order that he may see the remainder; and if he desires any of them placed in the RECORD we shall then do so.

The WITNESS. Yes, sir; I can identify them.

By Mr. BLACK:

Question. Where did you get those?

Answer. These were taken from the basement of the National Press Building on February 6, from a sack from the tenth floor as of February 1.

Question. There is one other that I did not have. By mistake I did not send it up. Was it also one of the papers?

Answer. Yes, sir.

Question. I send you now the remainder, in order that you may identify them, which are not offered as exhibits. Do you identify that entire group as the remainder now, Mr. Bradley?

Answer (after examining papers). Senator, these do not have my initials. They have Mr. Rittelmeyer's initials on them; and while they have

every appearance of being from that group, I presume he——

Question. Both of you put your initials on them and brought them up here together?

Answer. Yes, sir.

Mr. BLACK. We will ask that those simply be marked as "Exhibit X", without offering them as evidence to place in the record, but in order that counsel may see them and ascertain whether or not he desires to ask any questions about them.

The VICE PRESIDENT. Without objection, it is so ordered.

By Mr. WHITE:

Question. May I ask the witness how many letters or telegrams there are there which have been identified but which have not been introduced in evidence?

Answer. In this group, Senator, and in that one there?

Question. In both of the groups that you have identified, but which the chairman of the committee did not offer in evidence.

Answer. I presume there would be 20 on a guess, Senator; perhaps more.

Question. Will you not just run over them and see?

Answer. Yes, sir; I shall be glad to.

(The witness counted the papers.)

Mr. KING. Mr. President, while the witness is counting those papers, may I ask counsel for the respondent whether he has read in this morning's CONGRESSIONAL RECORD the letters beginning on page 2260 and ending on page 2264, and whether he admits, if he has read these letters, that the RECORD

here is a correct reproduction of the letters which were offered and identified yesterday?

Mr. RICHARDSON. Senator, I have in mind, sir, that one of the letters that was presented yesterday had at the top of it a reference to "Hay-Adams House", and I do not find in the CONGRESSIONAL RECORD any designation of "Hay-Adams House." Of course that is vitally important. I have not checked the other letters to know how many other things have been left out of those copies.

Mr. KING. I wish counsel would examine them, because it is unnecessary to have them printed again, now that they have been formally offered, if the RECORD correctly represents the letters which were produced yesterday and which have been formally offered today.

Mr. RICHARDSON. I will ask if I may do that when the Senate is progressing with the hearing of the other cases.

By Mr. WHITE:

Question. Now may I have an answer?

Answer. I count 27, Senator.

Mr. BLACK. That is all. Will you let Mr. Richardson have those letters now?

The VICE PRESIDENT. Are there any other questions?

Mr. BLACK. He does not want the ones that were identified, I presume, at this time. He wants to keep them separate. The ones that I wanted kept separate are the ones that had not been offered in evidence—in that envelop.

(Certain papers were turned over to Mr. Richardson.)

Mr. BLACK. Let me ask you one other question.

By Mr. BLACK:

Question. Were these sacks arranged according to the floors from which they came?

Answer. No, sir. We hoped they would be, but they were not.

Question. How did you designate the floor—by the contents?

Answer. By the contents; yes, sir.

Question. In other words, you had the names of the occupants of the various floors?

Answer. Yes, sir.

Question. And would find the mail in the bag, or the papers in the bag, and would by that means determine the floor from which the papers came?

Answer. Yes, sir; that is it.

Cross-examination by Mr. RICHARDSON:

Question. Mr. Inspector, there was no designation, then, sir, upon any of these bags which gave you any key at all to where the letters came from, or when they came. Is that correct?

Answer. That is right—no outside designation whatever.

Question. And when you say that letters were secured and are embraced in the letters which have been identified here as of date of February 1, you are simply presenting to the Senate the conclusion which you arrived at, based upon a method where you checked in a particular sack through the different dates of letters that were in there, that in all probability the letters there involved came down there on that particular date?

Answer. Yes, sir. The evidence was very conclusive.

Question. To you?

Answer. We were the ones making the examination.

Question. Precisely; but it was your conclusion as to the date?

Answer. Yes, sir.

Question. Based upon the fact that in a sack you found letters and other memoranda bearing a distinct date?

Answer. Yes, sir.

Question. And you concluded, because the letters in that sack bore a particular date, that the waste paper that went into that sack came down to the basement on that date?

Answer. There were not only letters——

Question. That can be answered "yes" or "no", sir.

Mr. McCarran. I ask that the witness be permitted to answer.

Mr. Richardson. So do I.

The Witness. Well, that answer should be qualified, sir.

By Mr. Richardson:

Question. Qualify it as you wish.

Answer. For the reason that every sack contained a certain number of daily papers from Washington, and that helped also in the identification.

Question. And it was from the dates of the papers, newspapers, letters, and documents in the sack that you reached the conclusion that was satisfactory to you that all of those papers came into that sack on that day?

Answer. Yes, sir; absolutely.

Question. If they had not come into the sack on that day, the contents of the sack would have looked just the same; would it not?

Answer. Yes, sir.

Question. How many sacks did you examine?

Answer. Approximately 300.

Question. All through?

Answer. Well, so nearly through that we were satisfied. In some cases we were able to eliminate sacks. For instance, we would open a sack, and if it contained a newspaper, a daily newspaper from Washington as of February 2, we knew that was not the sack we were looking for.

Question. And if there had happened to be put in that sack, by the attendant who rustles scrap paper for the building, a letter that had been deposited in the waste-paper basket the previous day, you never would have found it, would you?

Answer. Well, we depended not on one letter, sir. We satisfied ourselves from probably 8 or 10 particular exhibits before we were sure.

Question. Eight or ten of the documents found in the sack when you examined the date permitted you to arrive at a conclusion——

Answer. Yes, sir.

Question (continuing). Of when all the papers——

Answer. That is right.

Question (continuing). In a gunny sack came into the gunny sack?

Answer. Yes.

Question. Put there by someone you did not know?

Answer. Yes, sir.

Question. At a time you knew not of, for a purpose with which you were not acquainted; is that not so?

Answer. You are putting it in a rather roundabout way, but that is virtually what it is.

Question. Just another word and I am through. And as the result of the examination of the sacks that you examined, are these papers that you have identified here all of the papers of whatever kind, manner, or description that you could find containing anything that brought them back to the respondent here, Brittin?

Answer. Yes, sir. That is, every scrap of paper that we could find that we were satisfied belonged—had belonged at any time to Colonel Brittin, had been in his possession, we have brought before the committee here.

Question. And you found those papers in the February 1 sack?

Answer. Yes, sir.

Question. That you have described to the Senate?

Answer. Yes, sir.

Question. So that in your theory, as you saw it—and I appreciate it, sir—in your theory, as you saw it, there were placed in that sack on February 1 in the National Press Building over 30 documents traceable to Colonel Brittin?

Answer. The February 1st date there might be just a little bit misleading in this way, as going into the sack on February 1. I said as of February 1, because those charwomen go on duty at a quarter to 11 at night and work until 6 o'clock the next morning, and they may have been placed in there at any time from a quarter to 11 at night until 6 o'clock the next morning.

Question. You are not recanting at all this identification system you worked out, are you?

Answer. I think you will have to make yourself a little more clear.

Question. I wonder whether you have any doubt in your own mind, sir, as to the accuracy——

Answer (interposing). Not the slightest.

Question (continuing). Of the conclusion that you arrived at as to when a particular piece of waste paper was placed in a gunny sack?

Answer. Not the slightest, sir, as of February 1.

Question. Just by way of inquiry. How did you conclude that this belonged to Colonel Brittin [handing paper to the witness]? It is from exhibit X.

Answer. I did not know that that did come from Colonel Brittin. Just in that line, the same kind of stationery, the same as some of the others, and I said, "We will take no chances and we will just bring it up."

Question. You have not indulged in that liberal method of soul communication, have you, with any other papers that have been offered here?

Answer. I think not. I think it is just a matter of playing safe on that, sir, and you will find that the others are more or less connected.

Mr. RICHARDSON. That is all.

The VICE PRESIDENT. Are there any other questions?

Redirect examination by Mr. BLACK:

Question. In other words, when you found these scraps you could not tell, when they were first discovered, whether they would fit into this jigsaw puzzle or not?

Answer. No, sir; I could not.

Question. And you got this scrap along with other scraps?

Answer. Yes, sir.

Question. And you have pieced together the parts which you have there, and they show that they were Colonel Brittin's, do they not?

Answer. They do; yes, sir.

Question. So, so far as they are concerned, there can be no question but what they are Colonel Brittin's. Now may I ask you this further question? You opened up all of those sacks, did you not?

Answer. Yes, sir.

Question. And you found out from the 300 sacks, and observing the mail that was in them, that the custom with reference to those sacks, as shown by the 300, was such that you would find the mail of a certain day in a certain sack?

Answer. That is right.

Question. And you found that with reference to the particular day in which you found this correspondence which was destroyed?

Answer. Yes, sir.

Question. And you had been informed before you went down there, the date that Colonel Brittin had said he destroyed his correspondence, had you not?

Answer. Yes, sir.

Question. And you were looking for that date so far as this sack was concerned?

Answer. Yes, sir.

Question. And you did find in that sack the particular letters which have been referred to, and finally pieced them together?

Answer. Yes, sir.

Question. I assume that in bringing those pieces out of there you probably found some pieces of

some parts of correspondence that you could not piece up with anything else, did you not?

Answer. Yes, sir. That is the part that he (Mr. Richardson) referred to there.

Question. And that is the best you could get, and you got all you could?

Answer. That is right.

Question. Did you have any other pieces that indicated that you were missing anything of correspondence like that?

Answer. Oh, yes. We were unable to find quite a few pieces to complete the file.

Question. And you brought them back in that way?

Answer. Yes, sir.

Question. Incomplete?

Answer. That is right, sir.

Mr. BLACK. All right.

The VICE PRESIDENT. Are there any further questions?

By Mr. WHITE:

Question. Were there incomplete pieces other than those which have been identified here?

Answer. I think not, sir. I believe everything is here. I noticed an envelop with some envelops in here a moment ago that I had not identified.

Re-cross-examination by Mr. RICHARDSON:

Question. Mr. Inspector, how do you account, in this working theory of yours, for what has become of the missing parts of letters you cannot find?

Answer. I just do not account for it, sir. I know that we searched and searched and got everything that we could. It is possible that we overlooked a few little fragments. It is possible that they may

have fallen out from a hole in a gunny sack, something like that.

Question. It indicates to your mind, does it not, that between the time of deposit of a torn letter in the wastebasket and the time you took it out of the sack part of the letter had been lost, does it not?

Answer. Something happened to part of those letters, because we did not have fragments; and whether in the human equation we overlooked them or whether they were lost in the sack we have no way of knowing.

Question. And the losing of a piece of paper could apply just as well to a complete letter as to a fragment, could it not?

Answer. I presume it could; yes.

Mr. RICHARDSON. That is all.

The VICE PRESIDENT. Any further questions of the witness?

Mr. AUSTIN. I should like to ask a question.

The VICE PRESIDENT. The Senator from Vermont.

By Mr. AUSTIN:

Question. Did you examine sacks which you thought represented the 10 days preceding February 1?

Answer. Yes, sir. We started in—there were some of those sacks from around January 21, 22, and on up, clear up to the date of our visit up there.

Question. You examined every one of them?

Answer. Yes, sir.

Question. And every piece of paper in them?

Answer. No, sir; not every piece of paper. Might I explain we were able to eliminate a good many of those sacks conclusively that they were

not the date for which we were searching, and therefore we had no further interest in them.

Question. Were you not searching for waste from Colonel Brittin's office on any of those dates?

Answer. No, sir. Searching for waste as of February 1.

Question. And so you cannot testify that there may not have been waste from Colonel Brittin's office contained in each one of the gunny sacks for 10 days preceding the 1st day of February, can you?

Answer. There were—yes; I would have to qualify that a little ways, because the sacks we had reason to believe were of February 1 and February 2, along in there; we were much more careful in going through those than we were of those further back either way.

Question. Well, were you not interested to find Colonel Brittin's waste paper for 10 days preceding February 1?

Answer. No, sir.

Question. You did not look for it at all?

Answer. No, sir.

Question. How many sacks for each day did you find?

Answer. There are approximately 50 sacks that come down there each day. It is hauled away from the building about twice a week.

Question. How many sacks for each floor?

Answer. There are about four, an average of four, from the tenth floor particularly, that we know about.

Question. Did you find all these pieces of waste paper in one sack?

Answer. Yes, sir; right in the bottom of the sack.

Question. Do you remember how many sacks from the first floor which you concluded were taken down on February 1 were there?

Answer. From the first floor?

Question. Did I say the first? I meant the tenth floor.

Answer. No; I could not, but I should say there were at least four. I could not say positively, because we knew we had a number of false alarms, and we were rather of the opinion that we might find something and did not.

Mr. AUSTIN. That is all.

The VICE PRESIDENT. Are there any further questions?

Mr. BLACK. I just want to ask him one more question to make a matter clear.

By Mr. BLACK:

Question. When you went down there, you were informed that Colonel Brittin had testified that he had torn up and thrown into the waste-paper basket letters on a certain day, were you not?

Answer. Yes, sir.

Question. And you went down to look for those letters which had been torn up, according to Colonel Brittin's statement, on that certain day?

Answer. That is right.

By Mr. AUSTIN:

Question. I should like to ask the witness at whose instance did you make this search?

Answer. It was on our own initiative, sir.

Question. To whom do you refer when you say "our"?

Answer. Inspector Rittelmeyer and I were working together on this case, and we decided that it would be a good idea to look through that trash.

Question. Whom do you represent?

Answer. We represent—we are working for the Post Office Department, but we are also working for the Senate committee investigating this case.

Question. You had no special instructions for this search?

Answer. Not for this search, no sir; until later, we informed Mr. Patterson what we were doing, and he said, "That is fine."

Mr. AUSTIN. That is all.

The VICE PRESIDENT. Are there any further questions? May the witness stand excused?

Mr. BLACK. He may stand excused.

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SEP 18

CHARLES ELMOR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, PETITIONER

v.

WILLIAM P. MACCRACKEN, JR., RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK J. HOGAN,
EDMUND L. JONES,
DUKE M. PATRICK,
Attorneys for Respondent.

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I

THE FACTS OF THE CASE

The material facts are concisely, but completely, stated in the opinion of the Court of Appeals, pages 109-114 of the record. The dissenting opinion states that "The essential facts to an understanding of the case are fully set out in the opinion." A perusal of the four pages on which the facts are "fully set out" will demonstrate that the statement in the petition of the "Question Presented" is *not* a statement of the question presented by *this* record.

II

THE APPLICABLE RULE OF THIS COURT

This Court's Rule 38, Paragraph 5(c), indicates that review on certiorari will be considered:

> "Where the Court of Appeals of the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, . . . which has not been, but should be, settled by this court . . ."

III

PROPOSITION OF LAW ASSERTED BY PETITIONER

Petitioner's whole case is based upon the proposition baldly asserted, with black-faced emphasis, in his brief below, thus:

> **"There is no distinction in principle between the judicial and legislative power to summarily punish for contempt".**

That assertion petitioner now repeats here, minus the emphasis (p. 14).

Obviously the proposition thus asserted involves "a question of general importance". Equally obviously it is not a question "which has not been . . . settled by this Court". After fullest consideration and upon mature deliberation this Court has definitely settled that question contrary to petitioner's position. *Marshall* v. *Gordon,* 243 U.S. 521.

Petitioner's candor in asserting his position is as necessary as it is commendable. The essence of his entire case is the negation of the constitutional separation of the legislative and judicial functions. Petitioner naively supports his contention with the case that rejects it: *Marshall* v. *Gordon, supra.* There this Court, after pointing out that authority was possessed by the House of Commons in England to *punish* for contempt directly, that is, without the intervention of courts, which power indubitably, says the Court, rested upon an assumed blending of legislative and judicial authority possessed by Parliament, and adverting to the express grant to legislative bodies of power to *punish* for contempt contained in State constitutions, continued (l.c., p. 536):

> "No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, Sec. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution."

Petitioner fortifies the "support" which he asserts is given his position by the case from which the foregoing is quoted by citing, to the point that "There is *no* distinction in principle between the judicial and legislative power to summarily punish for contempt", *Toledo Newspaper Company* v. *United States*, 247 U.S. 402, wherein the existence of such a distinction is expressly recognized (l.c. 416, 418):

> "In *Marshall* v. *Gordon*, 243 U.S. 521, the power of Congress to summarily punish for contempt came under consideration and it was there pointed out that the enlarged legislative power on that subject which prevailed in England prior to the separation, whether based upon the commingling of legislative and judicial authority or upon any other cause, was necessarily in this country greatly restricted and changed by the effect of the adoption of the Constitution and the operation of the division of powers and the guarantees and limitations which that instrument embodied. . . .

> "While the *Marshall Case* concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable, to the extent that they may not be inapposite *because of the distinction between legislative and judicial power.* Indeed the identity of the constitutional principles applicable to the two cases, *subject to the differences referred to was pointed out . . .*" (Italics ours).

With aptness, we believe, we may here adopt with respect to petitioner's position the language of the great Chief Justice in *Marshall* v. *Gordon* and say that "it would seem that the difference between the legislative and the judicial power was also sometimes forgotten" (243 U.S. at page 544).

IV

THE SOLE QUESTION PRESENTED UPON THE RECORD IN THIS CASE

This case involves as its sole question the right of the United States Senate to take a private citizen into custody with a view to punishing him directly and without recourse to the courts for the past commission of a completed act, which, prior to the proceedings to punish and the arrest of the citizen, had been undone so that it no longer did, or could, affect any proceeding of the Senate or any committee thereof.

That is precisely, and exclusively, what the case made by the record filed here with the petition involves, though it is not so stated by petitioner.

Manifestly, that required the Court of Appeals to decide "a question of substance relating to the construction or application of the Constitution". But again we respectfully but earnestly insist that that is not a question which has not been settled by this Court. Petitioner contends, as he must under *the undisputed record facts* of the case, that the Senate has power summarily to arrest a pri-

vate citizen and punish him by imprisonment for a past and completed act, deemed by it to have constituted an offense against its dignity, irrespective of the fact that there did not, and could not, in the circumstances, exist any necessity for repression to prevent immediate recurrence of the act complained of, that is to say, the continued existence of any interference or obstruction to the exercise of the legislative power. In other words, this Court is asked to review a decision which does no more than hold that the implied power of each House of Congress to deal with contempt does not embrace punishment for contempt as punishment. Certainly this is a question which has been clearly and definitely "settled" by this Court. In *Marshall* v. *Gordon*, 243 U.S. 521, at page 542, this Court said:

> "Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power *it is clear that it does not embrace punishment for contempt as punishment*, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed." (Italics ours).

After then pointing out that the essential nature of the power makes it clear that, even when applied to subjects which justify its exercise, it is limited to imprisonment which may not be extended beyond the session of the body in which the contempt occurred, this Court held that where a particular act, because of its interference with the right of self-preservation, comes within the jurisdiction of the legislative body to deal with directly under its implied power to preserve its functions, that authority does not cease to exist because the act complained of had been committed when the authority was exerted, but with great clarity the Court pointed out the class of cases to which

alone the authority extended after the act complained of had been committed. This we submit, despite petitioner's reliance upon this part of the Court's opinion, is too clear for argument when there is considered the exact language of the opinion (p. 545):

> ". . . when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act *there is necessity for repression to prevent immediate recurrence,* that is to say, *the continued existence of the interference or obstruction to the exercise of the legislative power.* And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

By no stretch of the imagination could it be said that the act for which the Senate in this case asserted the right to inflict punishment for contempt as punishment was of a nature and character to admit of the claim that there was necessity for represion to prevent immediate recurrence, or that by any possibility there could have been an immediate, or any, recurrence, or that it was necessary for the Senate, at the time of the arrest of the respondent, to do anything to prevent "the continued existence of the interference or obstruction to the exercise of the legislative power", or that there was then any interference or obstruction. Indeed it is fair to say that no claim has ever been made in this case, either before the Senate or the Courts below, that the arrest of the petitioner was for the purpose of taking any action to prevent immediate recurrence of the act complained of or the continued existence of any interference or any obstruction to the exercise of legislative power. There was no threat of any recurrence,

immediate or otherwise, and there was not in existence any act either interfering or threatening to interfere with or obstruct the exercise of legislative power. We repeat, no such claim has ever been made in this case. It is the contention of the petitioner, as it was the assertion of the Senate, that, utterly irrespective of any "necessity for repression to prevent immediate recurrence" of an act of the petitioner which had occurred ten days before the Senate warrant under which he was arrested was issued—and which had been undone, and the effects of which had been removed six days before the issuance of that warrant—the Senate's power does "embrace punishment for contempt as punishment". In other words, it is flatly asserted that the power embraces that which this Court has flatly held it does *not* embrace (243 U.S. at page 542).

In this case the warrant was not issued for the purpose of exercising any authority to prevent acts which obstructed or prevented the discharge of legislative duty, or the refusal to do that which there is an inherent legislative power to compel in order that legislative functions may be performed. The warrant and the proceedings which led up to it and which followed its issuance did not have for their purpose the preventing of any act or the compelling of any act. There was no pretense of exerting a coercive authority. There was a claim to an unreviewable right to exert punitive authority.

Hence, the Court of Appeals had before it nothing that had "not been settled by this Court" and its decision merely gave "proper effect to an applicable decision of this Court".

V

THERE ARE STATUTORY PROVISIONS, AND LEGISLATIVE POWER TO PROVIDE, FOR PUNISHMENT OF CONTEMPTS OF CONGRESS "UNDER THE CRIMINAL LAWS IN THE AMPLEST DEGREE".

Confusion results from reiteration of the idea that unless the Senate had the power it asserted in this case, then

the deliberate refusal of a witness to testify before a congressional investigating committee, when lawfully required so to do, or the wanton destruction by a witness of documents which he has been lawfully subpoenaed to produce before such a committee, would go unpunished. Nothing could be more erroneous than this. To compel a witness to answer a pertinent question propounded to him by any congressional committee, or propounded to him in a proper proceeding at the bar of either House of Congress, there is authority *in the legislative body* to imprison him until he does answer. To compel the production of a document lawfully called for, there is the same authority. There is more than that. There is authority under the general criminal law to punish by fine and imprisonment the refusal to testify or to produce documents (Secs. 102-104, R.S.U.S.; Act of January 24, 1857, 11 Stat. 155, c. 19). This of course covers any case of the destruction of such documents whereby their lawfully called-for production is thwarted. *The power to punish* for refusal to testify or produce, under the general criminal law, after trial before a judicial body, *does not end* when the offending witness recants and testifies or produces. *But the power of the legislative body to deal with the contempt*, which power rests in that body only *for the purpose of compelling* the doing of that which it has a right to have done, *does so end.* Except in isolated cases where for the moment the purpose and the extent of the legislative power to deal with contempts were obviously overlooked, this has consistently been recognized:

> "Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law. So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the im-

> plied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration." (243 U. S. 544.)

And with respect to the exceptions thus adverted to, the Court said:

> "In the two or three instances . . . we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten . . ." (243 U. S. 543.)

We shall not here go into a discussion of the facts upon which was based the charge that respondent had committed an act of contempt. Hereinafter, to the extent that statements contained in the petition seem to require it, we shall briefly advert to the facts of this case, none of which was disputed, all of which were conceded. We have denied and we again earnestly deny the commission of any act justifying such a charge or any act justifying criticism of or reflection upon respondent's conduct. For present purposes it is sufficient, though hardly needful, to point out that if there was justification for the charge the law provided for its prosecution and the Constitution and applicable statutes provided the tribunals where alone the charge could be made and the respondent tried. That tribunal is judicial and not legislative. Otherwise it would be manifest that—

> "those things which, as pointed out in *In re Chapman, supra,* were distinct and did not therefore the one frustrate the other—the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other." (243 U. S. 547.)

The Congress has enacted, and there is in existence, statutory law covering *punishment* for contempts consisting of refusal to testify or to produce documents subpoenaed. R.S.U.S., Sec. 102. This was within the legislative power of Congress. The Congress has plenary legislative power to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act:

> "We repeat, out of abundance of precaution, we are called upon to consider not the legislative power of Congress to provide for punishment and prosecution under the criminal laws in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends." (243 U. S. at 548.)

VI

COMPARISON OF CONCEDED FACTS WITH PETITIONER'S STATEMENT OF QUESTION PRESENTED

The facts were not disputed, yet they are quite different from what the petition here, at least inferentially, represents them to be. Respondent neither secreted nor destroyed, nor permitted to be secreted or destroyed, any documents called for by the subpoena of the Senate Committee. He neither "wilfully", nor otherwise, did or per-

mitted any such thing to be done. Nor did he at any time refuse to testify. And, we repeat, this is not the subject of question or dispute. Concededly respondent immediately the subpoena was served upon him produced every document embraced within its comprehensive terms, except only communications between himself and his clients, relating to the subjects in respect of which he was retained as attorney, which he conceived to be privileged. Concededly respondent promptly—the very day the subpoena was served—compliant to the Committee's request, telegraphed his clients for instructions as to whether or not they waived the privilege. Concededly every one of his clients did waive, and every document, whether privileged or not, was produced instantly waivers were received. Concededly, before the warrant involved in the instant case was issued, every document covered by the subpoena had been produced and was in the actual possession of the Senate Committee. (R. 11) Finally—concededly—the only papers subpoenaed which were ever out of respondent's possession, after service of the subpoena, were those which he permitted the client, whose papers they were, to have for examination, and these the client had promptly returned and they had been produced and delivered to the Senate Committee six days before the issuance of the warrant. (R. 8-9) It will, of course, be remembered that as to the "Brittin incident" it is conceded (a) that respondent had no connection with or knowledge of it, and (b) that the papers there involved were not covered by the subpoena. (R. 6-7; 57-67; opinion, R. 112; 117)

Since petitioner here demurred to respondent's petition for habeas corpus, thereby admitting the truth of the material facts there stated, it is, in the light of those indisputable facts, somewhat difficult to understand the present petition's statement of the question presented. Hence we have herein undertaken to state the real, and only, question which this record presented to the United States Court of Appeals for this District.

VII

CONCLUSION

The questions of general importance and of substance relating to the construction or application of the Constitution involved in this case have heretofore been settled by this Court. The Court of Appeals plainly gave proper effect to the applicable decisions of this Court. We recognize the importance and delicacy of any case calling into question an asserted power of a coordinate department of the Government—or even, as here, of one branch of such department. After all, that consideration would seem to be the only real reason here relied upon by petitioner. But it has never yet been thought that the fact that the issuance of the writ of certiorari was prayed by the Government, or any of its departments, in and of itself called for the granting thereof. And that it should not be now so considered is—

Respectfully submitted,

FRANK J. HOGAN,
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Attorneys for Respondent.

Washington, D. C.,
September 17, 1934.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934

No. 339

CHESLEY W. JURNEY, *Petitioner,*

vs.

WILLIAM P. MACCRACKEN, JR., *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

---

BRIEF FOR THE RESPONDENT

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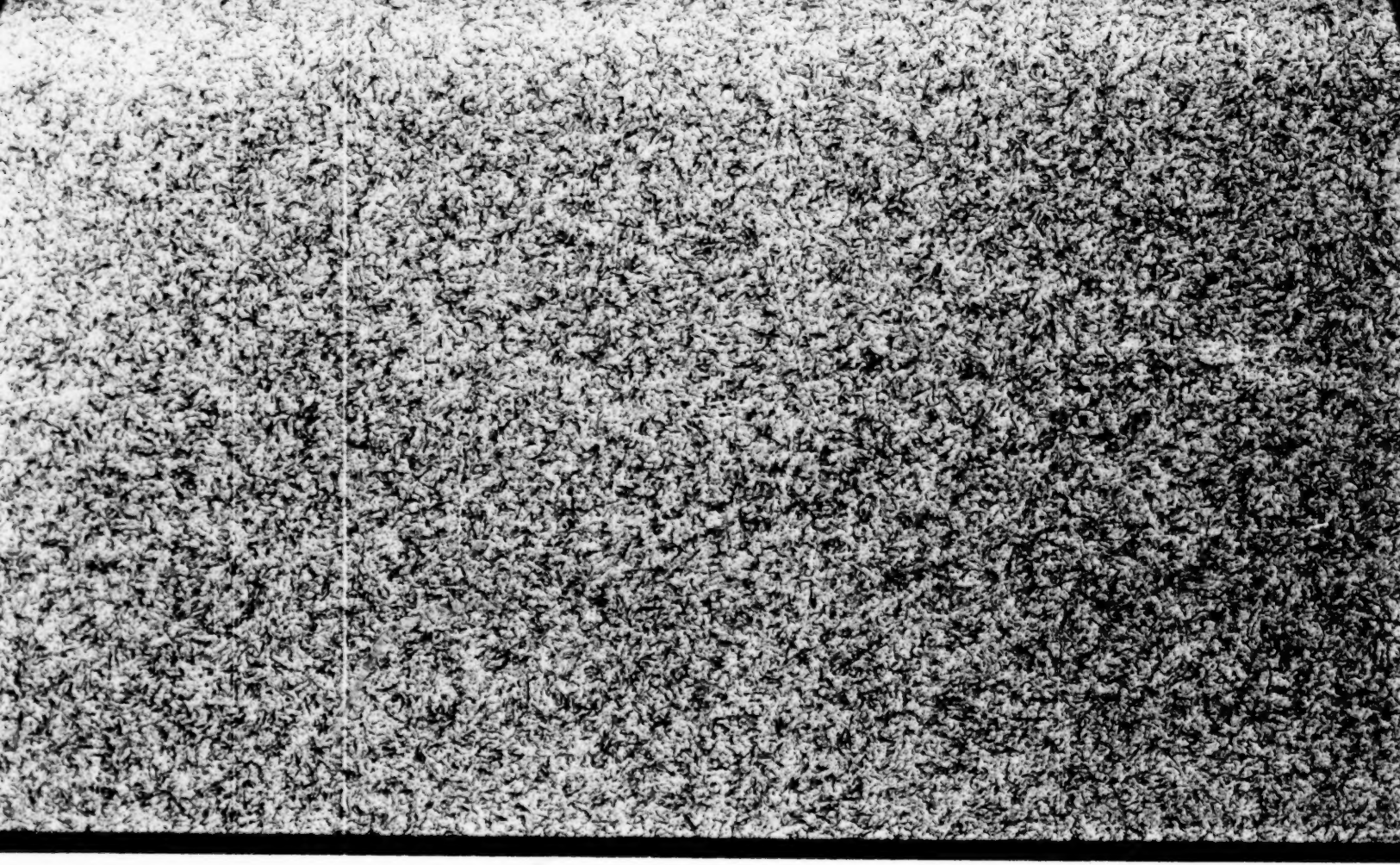

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BRIEF FOR THE RESPONDENT

I.

QUESTION PRESENTED

This case involves as its sole question the power of the United States Senate to arrest a private citizen with a view to punishing him directly and without recourse to the courts for the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could no longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest.

II.

STATEMENT OF THE CASE

We are unable to accept petitioner's statement of the case as being sufficiently clear, accurate or detailed to

afford a proper understanding of the questions hereinafter dealt with. A complete, and at the same time concise, statement of all of the facts in the case is contained in the majority opinion of the United States Court of Appeals for the District of Columbia. Of the majority opinion, the dissenting opinion accurately says: "The essential facts to an understanding of the case are fully set out in the opinion, and it is not necessary or desirable to repeat them here" [R. 118]. In the interest of brevity we, therefore, adopt the statement of the case contained in Mr. Justice Robb's opinion without repeating it here [R. 109-114].

III.

ARGUMENT

A.

RESPONDENT'S ALLEGED OFFENSE AND THE STEPS TAKEN BY THE SENATE TO PUNISH SUCH OFFENSE AS A CONTEMPT OF THAT BODY.

(1) The acts complained of were past and completed acts.

The essential and vital facts in this case are those which have been described in the opinion of the United States Court of Appeals for the District of Columbia as the "Brittin incident" and the "Givven incident" and the resulting action of the Senate in having respondent arrested and deprived of his liberty by its Sergeant-at-Arms under its Resolution 172 [R. 80] and its warrant of February 9. [R. 2, 35; Exhibit "A", R. 13 to 14].

It is of vital importance and of the essence of this case to keep always in mind that at the time of the adoption of Senate Resolution 172 both the "Brittin incident" and the "Givven incident" were closed. They were completed transactions.

Contrary to petitioner's insistence, no importance can be attached to the fact, if it be a fact, that a part only of the papers taken from respondent's office by Brittin were

recovered by the Senate Committee. These papers had been taken from MacCracken's and Lee's office by Brittin without respondent's knowledge, acquiescence or consent, and had been destroyed by Brittin without respondent's participation or knowledge, and were at the time of the adoption of Senate Resolution 172 as unavailable to respondent as they were to the Senate or its Committee. Respondent had nothing to do with, and was in no way responsible for that unavailability. [R. 6-8; 58, 59, 60, 67]. The papers which had been taken from respondent's office by Givven, to be examined by Hanshue, respondent's client, before he decided whether or not to waive privilege, had been returned and delivered to the Senate Committee on February 3, 1934, two days prior to the adoption of Senate Resolution 172. [R. 9]. They were available to the Senate and its Committee at the time of the adoption of that resolution and were not at that time avail ble to respondent.

Respondent was subpoenaed *January 31st**; he appeared as a witness that day and then produced every document called for, save only those which, in his honest judgment, he could not lawfully produce without consent of his clients. *February 2d* he testified to the Givven and Brittin incidents—to his part in the former, his lack of part in, or knowledge at the time it occurred, of the latter. *February 3d* all of the papers taken by Givven for examination by Hanshue were produced and delivered to the Senate Committee. *February 5th* every paper called for which respondent could produce (all clients having then waived privilege) was produced, and delivered to the Senate. By *February 6th* every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate. Respondent had nothing to do with the fact, if it be a fact, that any Brittin paper was not produced. *February 9th*, when there was nothing further the Senate desired to *compel* respondent to do or to *restrain* respon-

*Except where otherwise noted, all italics in this brief are ours.

dent from doing, the warrant of arrest involved in this case was issued.

There was nothing which the respondent could do to alter the situation. He was at the time of the adoption of Senate Resolution 172 and at the time the warrant, which caused him to seek *habeas corpus*, was ordered to go out, utterly powerless to alter the situation as it then existed in the slightest degree. The only *act of his* (permitting a client to have for examination papers which the client promptly returned and delivered to the Senate Committee) charged as a contempt was then as completely closed and beyond his power to add or detract from, or the legal consequences thereof, as were the transactions which the select committee of the Senate had been originally appointed to investigate.

Moreover, no question relating to the subject of the inquiry had been propounded to respondent which had not been answered by him [R. 11, Pet. Par. 30]. He had refused to answer no question but, on the contrary, professed his entire willingness at all times to answer any additional questions or furnish any additional information to the Committee, pursuant to its subpoena [R. 11, Pet. Par. 30]. There is no place in the record of the proceedings before the Senate which in any way suggests that at the time of the adoption of Senate Resolution 172 any further or additional information in the possession of respondent had been refused or would be refused by him, or was desired of, or required from, him [R. 11, Pet. Par. 30].

(2) Senate Resolutions 169 and 172 are essentially different; the former was adopted in furtherance of a valid legislative function and the latter in furtherance of an invalid judicial function.

If, in view of these circumstances, any doubt can be said to exist concerning the entire finality of the transactions which resulted in the adoption of Senate Resolution 172, it is at once dissipated by an examination of that resolution itself.

The certain and unequivocal language of that resolution provides that respondent and others involved in the Brittin and Givven incidents be cited "to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files and memorandums from the files of William P. MacCracken, Jr." after the service of a subpoena upon him [R. 80]. The warrant under which respondent was taken into custody and all subsequent proceedings were conducted under and by virtue of this resolution, unaltered and unchanged in any particular. No extended argument is needed to show that even the Senate itself, in the language of its own resolution, considered the acts of respondent, which it regarded as obnoxious to it, final and completed acts. Senate Resolution 172 is final and definite in its terms, and charges the commission of past and completed acts just as would an indictment or information based upon the same transactions.

Nor is there even a suggestion in the resolution itself or in the proceedings subsequent to the time of its adoption to the effect that other and additional information was required of respondent. The sole and only purpose of this resolution and the proceedings contemplated thereby, according to the undisputed facts, the resolution itself, and the proceedings had thereunder, was the punishment of respondent for past and completed acts which, in the opinion of the Senate, constituted a contempt of that body.

It will serve, we believe, to illumine the argument by calling attention to the Senate's recognition of the distinction between the proceedings instituted by Resolution 169, adopted by that body on February 2nd, and the warrant for the arrest of respondent issued thereunder [R. 76, Exhibit I], *and* Resolution 172, of February 5th [R. 85, Exhibit K], and the warrant issued under it [R. 13-14, Exhibit A].

The Air Mail Investigating Committee having reported to the Senate that respondent, under the claim of privilege had failed and refused to produce before that Committee documents called for by its subpoena served on respondent, the Senate adopted Resolution 169 by which, after reciting the service of the subpoena and the failure to produce all papers described therein, it was declared that—

> "Whereas, the appearance and testimony and correspondence, records, files and books are material and necessary *in order that the Committee may* properly execute the functions imposed upon it and *obtain information necessary as a basis for such legislation* as the Senate may deem necessary, concerning ocean and air mail contracts: Therefore be it
>
> "Resolved, That the President of the Senate issue his warrant, commanding the Sergeant at Arms or his deputy, to take into custody the body of the said William P. MacCracken before the bar of the Senate and to bring with him the correspondence . . . referred to and *then and there to answer such questions* pertinent to the matter under inquiry . . . *as the Senate may propound* . . ."

Obviously, the Senate was here following the precedent of *McGrain* v. *Daugherty*, 273 U. S. 135.

Under the warrant based on Resolution 169 petitioner was arrested, brought before the bar of the Senate, and released [R. 80].

Subsequent to the foregoing, Resolution 172 was adopted and it is to be noted that it no longer recited, or even pretended, that its purpose was to "obtain", or in any way further, or facilitate, the obtaining of, "information necessary as a basis for such legislation as the Senate may deem necessary." And it is likewise to be noted that its purpose was not to have respondent appear before the Senate's bar "then and

there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound." These were the purposes set forth in Resolution 169 and that was the function of the warrant based on that resolution. Respondent in no way challenged the legislative legitimacy of Resolution 169 or the validity of the warrant for his arrest based thereon. When, however, the Senate adopted its Resolution 172, and thereafter issued its February 9th warrant, it declared no such legislative purpose, it neither sought nor pretended to seek for information or to have answered questions pertinent to the matter under inquiry by its committee. On the contrary it flatly commanded that respondent, Brittin, Givven and Hanshue, appear at its bar—

> ". . . to show cause why they should not be punished for contempt of the Senate on account of the destruction and removal of certain papers, files and memorandums" from petitioner's files "after a subpoena had been served upon" him [R. 80].

And the warrant which deprived him of his liberty and took him into that custody which in this case he seeks release from declares the single purpose of the seizing of his body to be to—

> ". . . bring him forthwith before the Senate, to show cause, if any he has, why he should not be punished for contempt of the Senate for the matters and things" referred to in the citation which was in the words of the above quoted Resolution 172 [R. 14].

Manifestly, the Senate was here ignoring the precedent of *Marshall* v. *Gordon*, 243 U. S. 521.

And to emphasize the openly declared intent to exercise exclusively judicial powers in these proceedings the Senate adopted a "mode of procedure and rules"

to govern the trial "in the matter of William P. MacCracken, Jr.," and others "on an order to show cause . . ." On pages 87-89 of the record the Court will find the rules for the trial which the Senate adopted on February 8th. While it was stated by the Senator moving the adoption of the "order" containing "the mode of procedure and rules" that the order provided for "the method which was followed in the recent impeachment case" [R. 89], these rules of procedure differ from those governing trials in cases of impeachment in these striking particulars: (1) Here the Senate presented (after the manner of a grand jury) the charges and then (after the manner of a trial jury) undertook to hear and determine them; while in impeachment proceedings, the charging, or grand jury, function rests solely with the House of Representatives, the Senate having "the sole power to try all impeachments" (Art. 1, Section 3, Par. 6, Constitution); (2) here the Senate constituted its special Senate Air Mail Investigating Committee as its prosecutors of the charges against respondent; in impeachment proceedings Members of the House of Representatives, appointed by it as managers, direct the prosecution; (3) here, after conducting the prosecution, the prosecuting committee were to become members of the trial jury and in executive session vote upon the guilt or innocence of the respondent whose prosecution they had conducted in open session; while in impeachment proceedings when the evidence has been presented and arguments have been made the prosecutors, together with the counsel for the accused, withdraw from the body empowered to decide. Other distinctions to be noted are that no person may be convicted on a bill of impeachment without the concurrence of two-thirds of the Senators present; here there is asserted the power of a mere majority to convict and sentence to imprisonment. In a trial by jury unanimity is neces-

sary. What more forceful argument could be found for denying the power which the Senate asserts in the instant case than that furnished by the distinctions here enumerated?

Of course, it will be ever remembered that the power to bring and try cases of impeachment is expressly conferred (Art. I, Section 2, Par. 5; Section 3, Pars. 6 and 7, Constitution).

We have said that the intention to exercise exclusively judicial powers in this case was openly declared. There was not the slightest disguise in respect of this. In the course of the debate leading to the adoption of "the mode of procedure and rules" [R. 87] for the trial, discussion was had on the provision for the consideration of the case, after evidence had been introduced and arguments made, in a closed rather than in an open session of the Senate, and the Majority Leader of the Senate stated:

> "The only proceedings in closed session, as contemplated by the arrangement, have reference to the deliberation of the Senate. If a jury . . . in attempting to reach a conclusion, should hold their proceedings in open session, there would undoubtedly be influence brought to bear to stimulate obstructions which might prevent agreement" [R. 90, 91].

Senator Johnson asked the Majority Leader—

> ". . . if he likened the proceedings to one of trial by jury, where the jury retire and in executive session determine their verdict"?

The Senator from Arkansas replied—

> "Yes, exactly . . ." [R. 91].

Thus was presented in completely undisguised form the intention of the Senate of the United States, acting as a court and jury, to try a private citizen for a com-

pleted alleged offense for the sole purpose of inflicting punishment as such. To that end, and to no other, was respondent arrested, taken into custody, and deprived of his liberty.

In considering the ensuing discussion we earnestly request the Court to at all times have in mind the emphatic distinction between Senate Resolutions 169 and 172, as above set out.

(3) The Administration of Punishment as Such for a Past and Completed Act Is Criminal Rather Than Civil in Character.

Having thus shown the character of the acts for which the Senate sought to punish respondent and the resolution adopted by it for that purpose, let us now proceed to inquire into their legal significance. A proper beginning would seem to be a consideration of the nature of contempts and the remedy or punishment therefor.

This Court has dealt with this subject in a manner which, we believe, when applied to the facts of this case clearly demonstrates the unconstitutionality of the Senate's action.

In the case of *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, the court dealt with the classification of contempts into "civil" and "criminal" and said, on page 441 *et seq.*:

> "Contempts are neither wholly civil nor altogether criminal. And 'it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.' *Bessette* v. *Conkey,* 194 U. S. 329. * * * It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is *punitive,* to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and

many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affrmative act required by the court's order.

* * * * * * * *

"On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. *Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.*

"It is true that either form of imprisonment has also an incidental effect. For if the case is civil and the punishment is purely remedial, there is also a vindication of the court's authority. On the other hand, if the proceeding is for criminal contempt and the imprisonment is solely punitive, to vindicate the authority of the law, the complainant may also derive some incidental benefit from the fact that such punishment tends to prevent a repetition of the disobedience. *But such indirect consequences will not change imprisonment which is merely coercive and remedial into that which is solely punitive in character, or vice versa.*"

Certain of the statements made in the *Gompers* case are obviously inapplicable to the facts of the present

case, due to the fact that the contempt there under consideration was a contempt of court where parties other than those charged with contempt would be affected by such contempt or the court's action with respect thereto. But the fundamental and basic differences between civil contempt, which results from the wilful refusal to do an affirmative act as ordered by a competent authority, and criminal contempt, which results from the wilful doing of a thing which has been prohibited by an order of such an authority, is applicable and controlling here. A brief reference to the character of the acts for which the Senate sought to punish respondent and the nature of that punishment will serve to illustrate.

Laying aside for the moment any question concerning the so-called Brittin incident with which respondent admittedly had no connection, (but which constitutes petitioner's main factual foundation in his brief here), the act of respondent complained of by the Senate in Senate Resolution 172 was the permitting Givven to take to Hanshue certain papers, which were later returned, subsequent to the service of a subpoena on respondent which commanded him to deliver some of these papers to the Senate Committee. The offense to the Senate charged against respondent is therefore not the refusal to deliver the papers in response to that subpoena as the record fully shows, but rather the doing of an act which might have made impossible compliance with the subpoena itself. In other words, his offense, if any, consisted in failing to hold certain of the papers taken by Givven in readiness so that they might be immediately delivered by him in response to the subpoena if and when he received the consent of his client. To put it most strongly against the respondent it was the doing of something which might by implication be regarded as a prohibited act. Certainly it was not the refusal to do an affirmative act.

Testing the matter again by reference to the nature

of the punishment in view of the admitted facts at the time when the proceedings to enforce this punishment were initiated by the adoption of Senate Resolution 172, the same conclusion must be reached. As heretofore pointed out, there was at this time no pending question, and no document in existence, requested and unfurnished by respondent. Insofar as the incidents under consideration at that time were concerned, the punishment proposed could not possibly have been remedial, either in its purpose or effect. Its only possible object and purpose was *punitive*.

Not only is punishment for crime a judicial function; not only, under our Constitution, is the judicial power sharply separated from the legislative and executive; but it is contrary to the spirit of our institutions to treat anything as a crime, unless it be defined and its punishment fixed beforehand; or to permit imprisonment to be imposed by any branch of the Government, as punishment, except the judiciary. A person charged with crime is to be tried by a court presided over by a judge learned in the law, unbiased as to facts, and responsible to higher authority for failure to follow the usual methods of procedure—either by reversal or impeachment. He is not to be indicted, tried, judged and sentenced by a purely political body of our Government where, after hearing the same evidence and being, presumably, governed by the same rules of law, partisan reasons may result in a division on the questions of guilt and infliction of punishment based almost entirely on party lines; a body responsible to no higher authority for its ignoring of evidence or its disregard of settled law; from which, if the Senate's present position be sound, there is no appeal; against which no bill of impeachment can be brought. If these be not sound propositions then indeed has Government under a written Constitution disappeared from this land.

Nor will it alter the character of the transaction to say that even though designed and intended as a punitive measure, it would also have remedial effects. In the first place, the primary and not the incidental object and purpose is the one which controls the nature of the imprisonment. *Gompers* v. *Bucks Stove & Range Co., supra.* In the second place, the record shows that under the circumstances it could not have had a remedial effect. The offense with which respondent was charged when tested by any standard constituted a criminal contempt.

B.

THE SENATE HAS NO CONSTITUTIONAL POWER TO ADMINISTER PUNISHMENT, AS SUCH, TO A PRIVATE CITIZEN FOR CRIMINAL CONTEMPT OF THAT BODY, OR OTHERWISE.

In vain do we search the Constitution of the United States for any provision authorizing either House of Congress itself to try and imprison a citizen for any offense.

Art. I, Sec. 5, provides that a smaller number than a quorum of each House—

> "may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.
>
> "Each House may determine the rules of its own proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member."

These are the only provisions of the Constitution giving either House the power of inflicting punishment. Under them that punishment can be inflicted only on a member of the House, and then only for the violation of its rules or the disturbance of its proceedings.

But there are other provisions of the Constitution which clearly safeguard the citizen from such attempts

on the part of either House of Congress as that made by the Senate in this case.

Art. III, Sec. 1: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

This Court has said that this means the *whole* judicial power shall be vested in the courts. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304, 328.

Art. III, Sec. 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury;".

Amendment V: "Nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

Having shown to a demonstration that respondent was arrested on a warrant of the United States Senate for the purpose of trying him at the bar of that body for an alleged crime, it follows that we have also demonstrated that there were ignored the vital provisions of the Constitution which we have here just quoted.

Heretofore we have considered the character of the petitioner's act, the proceedings of the Senate with respect thereto, and the legal significance of both. In discussing the cases relating to the constitutional power of the Senate to proceed in a manner indicated by Senate Resolution 172, and punish respondent directly as for the commission of an act amounting to criminal contempt without recourse to the courts (and, as a means to that end, to deprive him of his liberty under arrest), we will reserve for later consideration cases of the type of *In re Chapman,* 166 U. S. 661, and *Sinclair* v. *United States,* 279 U. S. 263, which although they deal with the subject of contempt of the Senate, arose in prosecutions under indictments, tried,

under the general criminal law, before juries in a court expressly given jurisdiction by statute; which cases, therefore, do not involve the question of the power of the Senate to proceed against an alleged offender by its own process.

When in this discussion reference is made to the power of the Senate or the House of Representatives, it is to be understood that what is said with respect to the one applies with equal force to the other, "both being on the same plane in this regard." *McGrain* v. *Daugherty*, 273 U. S. 135, 160.

(1) The Decisions of this Court Upon the Subject Establish the Lack of Constitutional Power on the Part of the Senate to Proceed in the Manner Provided by Senate Resolution 172 and Its Trial Rules Adopted for This Case.

At an early date in American constitutional history the contention was made that the power of Congress and either House thereof directly to punish a person not a member for a breach of its privileges amounting to a contempt was a broad power and one which, when formally exercised, could not be the subject of judicial inquiry. This proposition was urged upon the court in the first case on the subject, which is *Anderson* v. *Dunn*, 6 Wheat. 204, decided in 1821.

In this case the sole question presented was whether the House of Representatives can take cognizance of contempts committed against themselves *under any circumstances.*

This Court answered the single inquiry above stated in the affirmative but the case can in no wise be taken as authority for the existance of the broad power to punish for contempt, which when formally exercised, cannot be the subject of judicial inquiry.

In *Anderson* v. *Dunn, supra,* this Court in considering the rule by which the extent of the implied power of legislative assemblies to deal with contempt was controlled, declared it to be "*the least possible power adequate to*

the end proposed," (6 Wheat. 231), which, said Chief Justice White in *Marshall* v. *Gordon, infra,* "was but a form of stating that as it resulted from implication and not from legislative will, the legislative will was powerless to extend it further than implication would justify." While the narrow point decided in *Anderson* v. *Dunn,* still stands, that case was commented on in *Kilbourn* v. *Thompson,* 103 U. S. 168, "and some of the reasoning of the opinion therein overruled and rejected" (Note, U. S. C. A., tit. 2, Sec. 194, p. 61). Indeed, in *Kilbourn* v. *Thompson* this Court takes up *Anderson* v. *Dunn* and expressly overrules, first, the ruling that the House of Representatives possesses the general power of punishment for contempt; and, second, that its judgment of contempt cannot be inquired into (103 U. S. 197-200).

The next case upon the subject was that of *Kilbourn* v. *Thompson,* 103 U. S. 168, decided in 1881. That case was an action of trespass for false imprisonment brought by Kilbourn against Thompson as Sergeant-at-Arms of the House of Representatives, and grew out of the conduct of Thompson in taking Kilbourn into custody and detaining him in jail pursuant to an order of the House to that effect. Upon his release from such custody by a writ of *habeas corpus,* Kilbourn brought this action. As a plea in bar to the action, Thompson set up the proceedings before the House which resulted in his taking Kilbourn into custody and detaining him.

From this plea it appeared that the House of Representatives had directed an investigation and by subpoena served upon Kilbourn he was ordered to appear as a witness and to bring with him certain records and papers relating to the inquiry. He appeared but refused to answer certain questions. His persistence in such refusal resulted in the custody and detention complained of.

In that case the contention was again made that the power of Congress or either House thereof to punish a

person not a member for contempt was a broad and unreviewable power.

The court took notice of the contention made and the fact that the argument in favor of the existence of such a power rested first, on its exercise by the House of Commons of England, from which it was said we have derived our system of parliamentary law, and secondly, the necessity of such a power to enable the two Houses of Congress to perform the duties and exercise the powers which the Constitution has expressly conferred upon them.

In answering these arguments, this court pointed out that such power was not expressly conferred by the Constitution and could not possibly be implied from the powers expressly conferred without doing violence to the letter as well as the spirit of the Constitution itself, which, the court observed, was the source of all Federal power of whatsoever nature. Among other things, the court discussed the difference between our legislative system and the English Parliament, observing that that difference had been judicially noticed and applied by the English courts themselves in the case of *Kielly* v. *Carson*, 4 Moore (P. C.) 63.

This court held that while under certain circumstances, either House of Congress has power to deal with an alleged contempt committed by a person not a member, the exercise of such power was expressly limited to cases where such power is necessary to the proper performance of constitutional functions, and that judicial inquiry into the circumstances surrounding the purported exercise of such power was not only contemplated by our constitutional form of Government but was necessary for its preservation.

In holding that the facts set up in the plea did not constitute a bar to the action because the plea itself disclosed that the inquiry of the House and proceedings had thereunder were not legislative but rather judicial in character, the court said:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers entrusted to governments, whether state or national, are divided into the three grand departments of the executive, the legislative and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system, that the persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

It was pointed out that the power of Congress itself when acting through the concurrence of both branches, is a power dependent solely on the Constitution, and that such powers as are not conferred by that instrument, either by express grant or by fair implication from such grant, are reserved to the states or the people themselves; that no general power of inflicting punishment was conferred upon Congress by that instrument, and that any such implication was repugnant to other express provisions, such as the due process clause of the Fifth Amendment, which had repeatedly been construed by this court and others of the highest authority as requiring in such cases a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by rules of law previously established.

To make what the court evidently regarded as a manifestly clear proposition doubly so, it was pointed out that of course neither branch of Congress when acting separately can lawfully exercise more power than is conferred by the Constitution on the whole body except in response to an express constitutional provision to that effect.

After analyzing the facts and noting the scope of the proceedings by virtue of which Kilbourn had been taken into custody, the court said:

> "The Constitution declares that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain. If what we have said of the division of the powers of the government among the three departments be sound, this is equivalent to a declaration that no judicial power is vested in the Congress or either branch of it, save in the cases specifically enumerated to which we have referred. We do not, after what has been said, deem it necessary to discuss the proposition that if the investigation which that committee was directed to make, was one that was judicial in its character and which could only be properly and successfully made by a court of justice, and if it related to a matter in which relief or redress could be had only by a judicial proceeding, that the power attempted to be exercised was one confided by the Constitution to the judicial and not to the legislative department of the government. We think it equally clear that the power asserted is judicial and that it *not* legislative."

But, while the case of *Kilbourn* v. *Thompson, supra,* laid down these principles which we regard as controlling in the present case, it remained for the court in a later case to apply these principles to a situation essentially similar to the present case in its fundamental aspects. That case was *Marshall* v. *Gordon,* 243 U. S. 521, decided 1917.

That case arose on a petition for the writ of *habeas corpus.* Marshall, the United States attorney for the Southern District of New York, had conducted a grand jury investigation which led to the indictment of a Member of the House of Representatives. Prior to the indictment the Member of the House on the floor had charged Marshall with many acts of misfeasance and nonfeasance. After the grand jury had found an indictment against the

Member, he moved, on the floor of the House, that the Judiciary Committee of the House be directed to inquire and report concerning the charges against Marshall insofar as they constituted impeachable offenses. After the adoption of this resolution a subcommittee was appointed which proceeded to New York to take testimony. Friction there arose between the sub-committee and the office of the District Attorney, Marshall, based upon the assertion that the sub-committee was seeking unlawfully to penetrate the proceedings of the grand jury. While the sub-committee was conducting its hearings in New York, Marshall addressed a letter to its chairman charging that the sub-committee was endeavoring to investigate and frustrate the action of the grand jury, rather than to investigate the conduct of the District Attorney, averring that these charges, which Marshall had theretofore given to a newspaper reporter, were true, and "repeating them in amplified form in language which was certainly unparliamentary and manifestly ill-tempered and which was well calculated to arouse the indignation not only of the members of the sub-committee but of those of the House generally. This letter was given to the press so that it might be published contemporaneously with its receipt by the chairman of the sub-committee. The judiciary committee reported the matter to the House and a select committee was appointed to consider the subject. The district attorney was called before that committee and reasserted the charges made in the letter, averring that they were justified by the circumstances and stating that they would under the same conditions be made again. Thereupon the select committee made a report and stated its conclusions and recommendations to the House as follows (243 U. S. 532):

> "'We conclude and find that the aforesaid letter written and published by said H. Snowden Marshall to Hon. C. C. Carlin, chairman of the sub-committee of the Judiciary Committee of the House of Representatives, on March 4, 1916 . . ., is as a whole and in

several of the separate sentences defamatory and insulting and tends to bring the House into public contempt and ridicule, and that the said H. Snowden Marshall, by writing and publishing the same, is guilty of contempt of the House of Representatives of the United States because of the violation of its privileges, its honor and its dignity.'

"Upon the adoption of this report under the authority of the House a formal warrant for arrest was issued and its execution by the Sergeant-at-Arms in New York was followed by an application for discharge on *habeas corpus* . . ."

The District Court discharged the writ and remanded Marshall to the custody of the Sergeant-at-Arms, and the case was brought on direct appeal to this Court to review the correctness of that action.

After reviewing the facts, the court said (p. 532):

"Whether the House had power under the Constitution to deal with the conduct of the District Attorney in writing the letter as a contempt of its authority and to inflict punishment upon the writer for such contempt as a matter of legislative power, that is, without subjecting him to the statutory modes of trial provided for criminal offenses protected by the limitations and safeguards which the Constitution imposes as to such subject, is the question which is before us."

Having thus stated the question before the court, the Chief Justice added that the court would proceed to meet and dispose of the issue as *one of first impression.*

Certain it is, said the court—

"that authority was possessed by the House of Commons in England to punish for contempt directly, that is, without the intervention of courts, and that such power included a variety of acts and many forms of punishment including the right to fix a long term of imprisonment. Indubitable also is it, however, that this power rested upon an assumed blending of legis-

lative and judicial authority possessed by the Parliament. . . ."

But the court, after noting that in this country prior to the formation of the Federal Constitution the incompatibility of the intermixture of the legislative and judicial power was recognized, and the necessity of separating the two was felt, declined to accept the argument that either House of Congress had such authority and said (p. 536):

> "No power was expressly conferred by the Constitution of the United States on the subject except that given to the House to deal with contempt committed by its own members. Article I, Par. 5. As the rule concerning the Constitution of the United States is that powers not delegated were reserved to the people or the States, it follows that no other express authority to deal with contempt can be conceived of. It comes then to this, was such an authority implied from the powers granted? As it is unthinkable that in any case from a power expressly granted there can be implied the authority to destroy the grant made, and as the possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution. . . . Whether the right to deal with contempt in the limited way provided in the State Constitutions may be implied in Congress as a result of the legislative power granted, must depend upon how far such limited power is ancillary or incidental to the power granted to Congress,—a subject which we shall hereafter approach."

On the subject of the nature and extent of this limited power, the court said (p. 541):

"What does this implied power embrace? is thus the question. In answering, it must be borne in mind that the power rests simply upon the implication that the right has been given to do that which is essential to the execution of some other and substantive authority expressly conferred. The power is therefore but a force implied to bring into existence the conditions to which constitutional limitations apply. It is a means to an end and not the end itself. Hence it rests solely upon the right of self-preservation to enable the public powers given to be exerted."

Concerning the right of the House of Representatives to punish for contempt as punishment, the court said (p. 542):

"Without undertaking to inclusively mention the subjects embraced in the implied power, we think from the very nature of that power it is clear that *it does not embrace punishment for contempt as punishment*, since it rests only upon the right of self-preservation, that is, the right to *prevent* acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is an inherent legislative power to *compel* in order that legislative functions may be performed."

And the court follows this with the statement (p. 542):

"Not only the adjudged cases but congressional action in enacting legislation as well as in exerting the implied power conclusively sustain the views just stated. Take for instance the statute* referred to in *In re Chapman* where, not at all interfering with the implied congressional power to deal with the refusal to give testimony in a matter where there was a right to exact it, the substantive power had been exerted to make such refusal a crime, the two being distinct the one from the other."

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* See Appendix.

Proceeding with a review of the legislative history of the exertion of the implied power to deal with contempt by the Senate or House when viewed comprehensively from the beginning, the court says that that history—

> "points to the distinction upon which the power rests and sustains the limitations inhering in it which we have stated."

Referring to the "principal instances" of the exertion by either House of Congress of the implied power to deal with contempt, collected in the margin of the report of *Marshall* v. *Gordon* at page 543, the court states of them that—

> "they all except two or three deal with either physical obstruction of the legislative body in the discharge of its duties, or physical assault upon its members for action taken or words spoken in the body, or obstruction of its officers in the performance of their official duties, or the prevention of members from attending so that their duties might be performed, or *finally with contumacy in refusing to obey orders to produce documents or give testimony which there was a right to compel.* In the two or three instances not embraced in the classes we think it plainly appears that for the moment the distinction was overlooked which existed between the legislative power to make criminal every form of act which can constitute a contempt to be punished according to the orderly process of law and the accessory implied power to deal with particular acts as contempts outside of the ordinary process of law because of the effect such particular acts may have in preventing the exercise of legislative authority. And in the debates which ensued when the various cases were under consideration it would seem that the difference between the legislative and the judicial power was also sometimes forgotten, that is to say, the legislative right to exercise discretion was confounded with the want of judicial power to interfere with the legislative discretion when lawfully exerted. But these considerations are accidental and do not change the

> concrete result manifested by considering the subject from the beginning. *Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify, the penalty or punishment for the refusal remaining controlled by the general criminal law.*" (pp. 543-4.)

Learned counsel for petitioner here observe (brief, p. 16) that in *Marshall's case* the Court pointed out that the legislative history of the exertion of the implied power "to deal with" [not *punish for*] contempt shows that some principal instances dealt with "contumacy in refusing to obey orders to produce documents or give testimony," but apparently overlooked what the court said in that regard in the sentence just italicized.

The opinion continues—

> "So again we have been able to discover no instance, except the two or three above referred to, where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, *or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration.*" (p. 544.)

After considering the acts then sought to be punished as a contempt of the House directly by that body, exercising its "implied power to deal with contempt, that is, the accessory power possessed to prevent the right to exert the powers given from being obstructed and virtually destroyed", and concluding that those acts were not of such a character as to bring them within the implied powers, as properly understood and limited, for the reason that there was room only for the conclusion that the contempt was deemed to result from the writing of the letter and not

because of any obstruction to the performance of legislative duty resulting from the letter, "or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the Committee and of the House generally", the court pointed out that

> "to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject." (p. 546.)

And in the instant case the claim that the Senate has power to inflict punishment as punishment "to vindicate its authority" is "confidently" rested upon the case from which these quotations are made!

This court was at pains, in the *Marshall Case*, to state that the effect of its holding was not in any way to interfere with the right of Congress by general legislative enactment to make criminal conduct which it deemed contemptuous. Congress has the undoubted power so to do, but under such legislation the determination of the guilt or innocence of any person so accused must be tried by a judicial tribunal in the manner contemplated by the due process clause of the Fifth Amendment of the Federal Constitution. Said the court (p. 546):

> "But these considerations plainly serve to mark the broad boundary line which separates the limited implied *power to deal with* classes of acts as contempts for self-preservation and the comprehensive legis-

> lative *power to provide by law for punishment* for wrongful acts."

In the instant case it is, we submit, perfectly patent that the Senate now asserts on the ground of necessity the existence of practically the full power belonging to the House of Lords, though this Court has distinctly held that it has no such power by express grant or by analogy to that body.

We submit that the decision in *Marshall* v. *Gordon,* a decision neither weakened nor destroyed in any subsequent case, clearly holds that while each House of Congress may have all power, by removal from its halls, and by coercive imprisonment, necessary to enable it to perform its constitutional duties, it is absolutely without power itself to impose punishment for a past act, which it may regard as contemptuous or a breach of its privileges. For such offenses punishments must be inflicted by the courts, as for other crimes, and under the safeguard of all constitutional provisions.

This is not to say that there is no power to continue to deal with contemptuous conduct to prevent its continuance or immediate obstructive recurrence. The power so to deal and the limitation thereof are made crystal clear in the Chief Justice's opinion in the *Marshall case.* In *Kilbourn* v. *Thompson,* 103 U. S. 168, this Court (page 182, *et seq.*), gave emphatic and unqualified approval to the decision of the privy council in the English case of *Kielley* v. *Carson,* 4 Moo. P. C. 63. In *Marshall* v. *Gordon, supra,* this Court again refers at length to *Kielley* v. *Carson* and gives unqualified approval to the principal point there decided, namely, that the ancient power of the British Houses of Parliament to inflict punishment, as such, for contempts or other offenses, did not exist in such legislative bodies as the Houses of Congress of the United States. This Court however reserved for further discussion the comprehensive holding of

Kielley v. *Carson* to the effect that there could in no case exist in the legislature the power of punishing any one for any past misconduct as a contempt of its authority. Coming to that discussion, Mr. Chief Justice White, in the *Marshall* case, after stating, as we have already pointed out, that the court had "been able to discover no instance", except two or three theretofore referred to, "where acts of physical interference were treated as within the implied power unless they possessed the obstructive or preventive characteristics which we have stated, or any case where any restraint was imposed after it became manifest that there was no room for a legislative judgment as to the virtual continuance of the wrongful interference which was the subject of consideration", said (pp. 544-5):

> "And this latter statement causes us to say, referring to *Kielley* v. *Carson, supra,* that where a particular act because of its interference with the right of self-preservation comes within the jurisdiction of the House to deal with directly under its implied power to preserve its functions and therefore without resort to judicial proceedings under the general criminal law, we are of opinion that authority does not cease to exist because the act complained of had been committed when the authority was exerted, for to so hold would be to admit the authority and at the same time to deny it. On the contrary when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority, we are of opinion that jurisdiction is acquired by Congress to act on the subject and therefore there necessarily results from this power the right to determine in the use of legitimate and fair discretion how far from the nature and character of the act there is necessity for repression to *prevent immediate recurrence,* that is to say, the continued existence of the interference or obstruction to the exercise of the legislative power. And of course in such case as in every other, unless there be manifest an absolute disregard of discretion and a mere exertion of arbitrary power coming within the

> reach of constitutional limitations, the exercise of the authority is not subject to judicial interference."

And upon that part of *Marshall* v. *Gordon* just quoted petitioner here "confidently" relies. We submit that it is not possible, with any show of soundness, to argue in this case that the act of respondent, for which the Senate asserted the right to try and punish him, was of such a character as to permit it reasonably to be determined, in the use of legitimate and fair discretion, that there was "*necessity for repression to prevent immediate recurrence,*" that is to say, the continued existence by respondent of any interference or obstruction to the exercise of the legislative power. No tenable argument can possibly be made, we earnestly insist, to uphold the contention that, after the papers subpoenaed by the Senate Committee which had been taken from respondent's office by Givven had been returned and produced before and delivered to that Committee, the Senate, or any one else, could legitimately and fairly conclude that there was "necessity," in proceedings which were not even commenced until after everything that could be done with respect to the documents had been done, to punish in order to prevent immediate recurrence of respondent's act. The *limit* of the power of the Senate, "when an act is of such a character as to subject it to be dealt with as a contempt under the implied authority," *is "necessity for repression to prevent immediate recurrence"* when "from the nature and character of the act" it can be legitimately and fairly concluded that "*immediate recurrence,* that is to say, the *continued* existence of the interference or obstruction to the exercise of the legislative power," is to be expected.

Petitioner's sole reliance for the sustaining of the asserted power of the Senate to inflict punishment, as such, is that part of *Marshall* v. *Gordon* which we have last quoted and discussed. We submit that so far from

supporting petitioner here the carefully limited exception to the general rule which the Court points out destroys petitioner's contention.

We have made it plain, we are sure that we recognize as settled the doctrine that each House of Congress in the performance of the legislative function must have some power of self help. We think, however, that the line of demarcation between that power, the power of self help or self preservation, and the power asserted in the instant case, is logical and plain, and is easily ascertainable from the reported cases. Obviously Congress as a deliberative body, passing laws upon careful consideration, has the right to preserve peace and decorum in its deliberations, to compel attendance of its members, to admit them to membership and to expel them, and to punish them for disorder; to keep order in the halls of Congress and to that end to eject any one disturbing its deliberations, and to seize and hold him until he may be turned over to the proper authorities for trial and punishment if he has violated any law; and, as to witnesses, to force a witness to attend before either House, or any committee thereof, and to testify, or produce, under proper subpoena, material documents, and, as a means to that end, to coerce him by imprisoning him until he does attend and testify or produce.

As to a witness, should he fail, when properly called upon to do so, to answer pertinent questions or produce material documents, the Senate (or House) in the exercise of the power to compel testimony may arrest and commit him, but such restraint cannot be made to extend beyond the time when the witness should signify his willingness to testify; such a witness can be held in custody so long as, but no longer than, he signifies his willingness to testify, or produce documents properly called for, and does testify or produce. For the offense committed by the past refusal to testify or produce the penalty or punishment remains controlled by the general criminal law (see

page 544, 243 U. S.). So long as he refuses to comply with lawful demands and is imprisoned, the recusant witness, of course, suffers punishment, but it is not inflicted as such; it is merely incidental to the power to coerce the witness. This is not punishment in the legal sense; this is not the "infliction of punishment, as such." And it is the power to inflict "punishment, as such," that is asserted in this case.

Difficulty is not encountered in seeking for an illustration of an act which though completed is of a nature and character to indicate, "in the use of legitimate and fair discretion," "the necessity for repression to prevent immediate recurrence." If during the deliberations of the Senate a private citizen occupying a place in one of its galleries so conducts himself as to disturb those deliberations, the mere fact that when the Sergeant-at-Arms, acting upon the order of the presiding officer, reaches that citizen he has ceased the disturbing act, does not deprive the Senate, acting through its Sergeant-at-Arms, from taking him into custody and ejecting him; nor does it deprive the Senate from holding him in custody for such period of time thereafter as may be necessary to await the arrival of the proper authorities to whom the Sergeant-at-Arms may be directed to turn him over for trial and punishment for his disorderly conduct. If that period of custody might be called punishment for a completed act of misconduct, it is obviously incidental to and necessarily results from the power to take the disorderly person into custody and to hold him in that custody to prevent immediate recurrence of that conduct of his which interfered with or obstructed the exercise of the legislative power. Thus far and no farther can either House go in any case of a private citizen charged with the commission of an act contemptuous of its power or infringing its privileges. That this case is not within the class in which that limited power might be exercised is, we submit, too clear to call even for the argument we have expended upon it.

By way of summary, the Chief Justice in his opinion in *Marshall* v. *Gordon* used language which we submit contains the essence of all arguments which could then or can now be made on the subject. That language was as follows (p. 546):

> "The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a *system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted* and secure their free exertion *and yet at the same time not substantially interfere with the great guarantees and limitations concerning the exertion of the power to criminally punish,*—a beneficient result which additionally arises from the golden silence by which the framers of the Constitution left the subject to be controlled by the implication of authority resulting from the powers granted."

As we have already pointed out, nothing that we here argue is to be, or can be, construed as contending that the efficiency and dignity of Congress have not been or cannot be amply protected. Existing law (Secs. 102-104, and Sec. 859, Revised Statutes),* enacted by both Houses, and approved by the Executive, would seem ample to provide for that protection. But if anything be lacking, there is still a vast reservoir in Congress to make provision therefor by law (Art. 1, Sec. 8, Par. 18.) And this point is made clear near the conclusion

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* See Appendix for these statutes.

of the opinion in *Marshall* v. *Gordon* where the court said (p. 548):

> "We repeat, out of abundance of precaution, we are called upon to c o n s i d e r *not the legislative power of Congress to provide for punishment and prosecution under the criminal laws* in the amplest degree for any and every wrongful act, since we are alone called upon to determine the limits and extent of an ancillary and implied authority essential to preserve the fullest legislative power, which would necessarily perish by operation of the Constitution if not confined to the particular ancillary atmosphere from which alone the power arises and upon which its existence depends."

In *Marshall's* case it was suggested "in argument that whatever be the general rule, it is here not applicable because the House was considering and its committee contemplating impeachment proceedings." After stating that that argument was irrelevant because the premise upon which it rested was unfounded, this court said (p. 547):

> "But indulging in the assumption to the contrary we think it is wholly without merit as we see no reason for holding that if the situation suggested be assumed it authorized a disregard of the plain purposes and objects of the Constitution as we have stated them. Besides it must be apparent that the suggestion could not be accepted without the conclusion that under the hypothesis stated the implied power to deal with contempt as ancillary to the legislative power had been transformed into judicial authority and become subject to all the restrictions and limitations imposed by the Constitution upon that authority,—a conclusion which would frustrate and destroy the very purpose which the proposition is advanced to accomplish and would create a worse evil than that which the wisdom of the fathers corrected before the Constitution of the United States was adopted. How can

this be escaped, since it is manifest that if the argument were to be sustained those things which, as pointed out in *In re Chapman, supra,* were distinct and did not therefore the one frustrate the other—*the implied legislative authority to compel the giving of testimony and the right criminally to punish for failure to do so*—would become one and the same and the exercise of one would therefore be the exertion of, and the exhausting of the right to resort to, the other."

We now come to the case of *McGrain* v. *Daugherty,* 273 U. S. 135. In that case a select committee of the Senate was formed pursuant to a resolution to investigate the administration of the Department of Justice. Daugherty was served with a subpoena commanding him to appear before the Committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him specified books. He failed to appear. A second subpoena was served on him commanding him to appear for the purpose of giving testimony—nothing being said in this subpoena about bringing books and papers. He again failed to appear; and no excuse was offered by him for either failure. The Committee reported the facts to the Senate which adopted the following resolution:

"Whereas the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper. Therefore be it

"Resolved, That the President of the Senate *pro tempore* issue his warrant commanding the Sergeant-at-Arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter un-

> der inquiry as the Senate may order the President of the Senate *pro tempore* to propound; and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed that the resolution in the *Daugherty* case and the *first* resolution [Senate Resolution 169; R. 76-7] directing the arrest of respondent in this case are substantially alike.

The warrant was issued agreeably to the resolution. Daugherty was taken into custody under it. Thereupon he petitioned for a writ of *habeas corpus,* which was granted. After hearing, the District Court discharged Daugherty from custody, and the case came here on direct appeal.

After stating that the case had been given "earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy," this Court stated that the questions in that case were (p. 154):

> "(a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, *to compel* a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution, and (b) *whether* it sufficiently appears that *the process was being employed in this instance* to obtain testimony *for that purpose.*"

After stating, as above quoted, the principal questions presented in *Daugherty's Case,* and disposing of certain minor questions, irrelevant here, this Court pointed out that the court was not, in the then state of that case (p. 160)—

> "now concerned with the right of the Senate to propound or the duty of the witness to answer

> specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate —which for present purposes must be assumed."

Here again we emphasize that that case solely concerned the power to arrest a private citizen and bring him before the bar of the Senate, there to be interrogated and required to answer questions pertinent to an inquiry being properly conducted by the Senate.

The entire decision in *McGrain* v. *Daugherty* is, we submit, found in three brief quotations:

> 1. "We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function" (p. 174.)
> 2. "We are of opinion . . . when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness's testimony was to obtain information for legislative purposes" (p. 177.)

And—

> 3. "We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; *that the Senate is entitled to have him give testimony pertinent to the inquiry,* either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment" (p. 180.)

Clearly this Court in *McGrain* v. *Daugherty* did not in any sense, either by statement or as a result of its holding, qualify the principles of law established in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon.* Clearly, also, those cases establish the proposition that the

Senate has no constitutional power to administer criminal punishment as such whether for an act amounting to a contempt of that body or otherwise.

(2) The Cases Involving Proceedings Under the General Criminal Law to Punish for Contumacy or Conduct Amounting to Contempt Do Not Controvert but Admit the Accuracy of the Rule Contended for by Respondent.

Cases of the type of *In re Chapman*, 166 U. S. 661, and *Sinclair* v. *United States*, 279 U. S. 263, are in no way inconsistent with the proposition which we submit is established by the cases which involve direct action against a person not a member alleged to have been in contempt of the privileges of either House or its application to the facts of the present case.

On the other hand, these cases show the correctness of the position taken by respondent before the Senate itself and the courts below, namely, that while restraint or imprisonment which is remedial and coercive in nature is embraced within the implied power of either House, if in aid of a legislative purpose, punishment as such for the purpose of vindicating the authority of such a body is properly a function for the court pursuant to the general criminal law (Revised Statutes, Secs. 102-104).*

In the *Chapman* case, the inquiry was conducted under a resolution of the Senate and related to charges published in the press that Senators were yielding to corrupt influences in the consideration of a tariff bill then before the Senate and were speculating in stocks the value of which would be affected by pending amendments to the bill. Chapman appeared before the committee in response to a subpoena, but refused to answer questions pertinent to the inquiry. His refusal to answer was certified to the United States Attorney for the District of Columbia and he was indicted and convicted under section 102 of the Revised Statutes. After the

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taking of certain other procedural steps, he secured leave and filed a petition for *habeas corpus* directly in this Court, in which he attacked the constitutionality of sections 102 to 104 of the Revised Statutes under which he had been convicted.

In disposing of the first question in the case, this court held the questions which had been propounded were pertinent to the inquiry, and it is obvious from an examination of the case that the court was impressed by the fact that the matter under investigation at the time of the contumacious conduct of Chapman was a matter peculiarly legislative in character, in that it involved charges of corrupt conduct of certain members of the Senate in connection with legislation then pending before it. It was pointed out that under the Constitution the Senate had, among other things, the power to punish its members for disorderly behavior and, with the concurrence of two-thirds, to expel the member. From this it was concluded that the investigation was necessarily legislative in character in that it pertained to the organization, conduct, and personnel of that branch of the legislative department. After holding that the questions propounded were pertinent to the inquiry, this Court said (p. 671):

> "The refusal to answer pertinent questions in a matter of inquiry within the jurisdiction of the Senate, of course constitutes a contempt of that body, and by the statute this is also made an offense against the United States."

Chapman's next contention was in the alternative; first, that the statute in question delegates to the District of Columbia Criminal Court the exclusive jurisdiction and power to punish as contempt the acts denounced and thus deprives the Houses of Congress of their constitutional functions in the particular class of cases, or secondly, if it be interpreted as leaving in the

Houses the power to punish such acts and vesting in addition jurisdiction in the court to punish the same acts as misdemeanors, then the law was invalid because subjecting recalcitrant witnesses twice to be put in jeopardy for the same offense contrary to the Fifth Amendment.

In rejecting this contention, the court pointed out that the statute in question did not have the effect of divesting either House of its power to punish directly for contempt in proper cases, but that it was also proper for the Congress, by concurrent action of both Houses, to make such conduct a misdemeanor against the United States. Here the court recognized in its holding and decision, although it did not expressly state, the inherent differences between punishment as such, a function of the courts, and punishment as an incident to the exertion of the power to coerce or restrain in aid of the performance of a legislative function. The recognition of this distinction is all that is insisted upon in the present case. And, as we have seen, in *Marshall* v. *Gordon,* the court expressly points out that such is the result of the decision in *In re Chapman* (243 U.S. 542, 547).

Sinclair v. *United States, supra,* involved a judgment of the Supreme Court of the District of Columbia sentencing Sinclair, under section 102 of the Revised Statutes,* for refusing to answer questions propounded to him by a committee of the Senate, during the conduct of an investigation made pursuant to resolutions which, as extended and amended, stated that one of its objects was to "ascertain what, if any, other additional legislation may be advisable, and to report its findings and recommendations to the Senate."

Sinclair's refusal to answer the questions was based upon the contention that since the Congress had authorized and directed the filing of suits by the Government for the

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purpose of cancelling the leases, which were the subject of the inquiry, since his previous appearance before the committee, he should not be required to divulge information which would be relevant under the issues then pending in judicial tribunals as a result of these Government suits.

In affirming the judgment of the trial court, this Court pointed out that the pendency of the suits to cancel the leases was a thing separate and apart from the power of the Senate to compel the giving of testimony which was proper and relevant to a legislative inquiry which was then in progress pursuant to a resolution to that effect. No question of any action of a remedial or coercive nature, was involved in the *Sinclair* case. And, of course, neither was any question of the power of the Senate directly to administer punishment involved. The existence of such a power was not for an instant asserted in that case. The act of Sinclair in refusing to answer pertinent questions was certified by the Senate to the District Attorney for action in a judicial tribunal. The action taken there was clearly intended as a vindication of the authority of the Senate and to inflict punishment—and hence the case was brought under the applicable criminal law and in a court of competent jurisdiction under that law.

We are thus brought again to the basic and fundamental differences between the *Chapman* and *Sinclair* cases and the present case, namely, first, that both of these cases involved contumacious conduct by witnesses who refused to answer questions propounded to them in proceedings which the court held were legislative in purpose; second, that neither case involved an attempt upon the part of Congress or either House thereof directly to punish a person not a member for conduct amounting to contempt, but on the other hand involved actions under the general criminal laws.

Manifestly, each of the above considered cases is wholly consistent with the position taken by respondent,

both before the Senate and the courts below. The *Chapman* case particularly recognizes and applies in its holding and decision the basic and fundamental difference between punishment as such and punishment which is merely an incident to a coercive measure. And this is twice pointed out in *Marshall* v. *Gordon,* 243 U. S. 521, at pages 542 and 547.

(3) The Cases Relied Upon by Petitioner Do Not Controvert but Admit the Accuracy of the Rule Contended for by Respondent.

The case of *Henry* v. *Henkel,* 235 U.S. 219, is cited by the petitioner for the proposition that the scope of the hearing before the lower court was confined to the single question of the jurisdiction of the Senate under whose authority respondent was held. We take no position at variance with the doctrine of *Henry* v. *Henkel.* But the learned counsel for the petitioner attempts to press it to the point of denying judicial inquiry in *habeas corpus* proceedings into the power of the Senate to deprive a private citizen of his liberty when the particular facts of the case disclosed that that power had been exceeded. Such is not the law.

In *McGrain* v. *Daugherty,* 273 U. S. 135, at pages 175-6, the Court said:

> "The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. . . . We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn* v. *Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry."

And obviously in such a case the only procedure open to the witness so refusing, in the event his refusal is followed by arrest or commitment, to secure his release, would be the writ of *habeas corpus.*

Again in *Sinclair* v. *United States,* 279 U. S. 263, at pages 291-2, the Court, referring to its decision in *McGrain* v. *Daugherty,* said:

> "And that case shows that, while the power of inquiry is an essential and appropriate auxiliary to the legislative function, it must be exerted with due regard for the rights of witnesses, and that a witness rightfully may refuse to answer where the bounds of the power are exceeded or where the questions asked are not pertinent to the matter under inquiry."

It is too obvious to require more than stating that a consideration of the facts of the case is essential to a determination of the question whether or not power has been exceeded.

The case of *McGrain* v. *Daugherty, supra,* is cited by petitioner to the proposition that the petition for *habeas corpus* shows upon its face that the Senate was exercising a legislative function in subpoenaing respondent and requiring him to produce documents before it, and that therefore the jurisdiction of the Senate is undisputed.

The material and essential facts of the case of *McGrain* v. *Daugherty,* as well as the scope of the court's holding in that case, have been dealt with hereinbefore. The inapplicability of that case as a precedent for petitioner here was made obvious in that discussion. There we conceded, as we conceded below, and again concede here, the right of the Senate to compel the attendance and response of a contumacious witness if the proceedings in which his testimony is desired are in furtherance of the exercise of a valid and constitutional power; if the purpose is legislative in nature. Here, however, the record affirmatively discloses that while the Senate may have been originally

engaged in the performance of a legislative act, there was a clear and manifest digression from the performance of a proper and constitutional function to one which was improper and unconstitutional. Senate Resolution 172 and the proceedings had thereunder were in no sense either legislative or remedial in character. The respondent here was taken into custody for the sole purpose of punishing him for a past and completed act, punishment which, if administered, could not possibly have remedial, preventive or compelling effects or consequences.

The case of *Marshall* v. *Gordon, supra,* is cited by petitioner. The particular language in the opinion in that case relied upon by petitioner here has been quoted and discussed by us hereinbefore (*ante, pages* 26-35). There, we submit, we completely disposed of that case as an authority for petitioner and showed to a demonstration that its doctrine unescapably supports the decision which the Court of Appeals rendered.

The language in the Chief Justice's opinion in *Marshall* v. *Gordon* upon which petitioner relies (243 U. S. 544-5), when fairly and properly construed can in no way be taken as a justification for the Senate's action in this case. As we have heretofore shown, there was not only no probability of respondent in this case again engaging in conduct of a similar nature which would be offensive to the Senate; there was no possibility of his doing so because, at the time of the adoption of Senate Resolution 172, all papers and documents which had ever been in his possession, save and except those involved in the Brittin incident, were in the possession of the Senate, and as to those involved in the Brittin incident—(a) their destruction was a known and accomplished fact; and (b) it is conceded in this case that respondent neither participated in, nor had knowledge of, that act [R. 7-8; Exs. E and F. pp. 31-32; 57-67]. In view of this record, we respectfully submit that there is no justification for the repeated statements in petitioner's brief that respondent "secreted" or "de-

stroyed", or connived at, or was in any way connected with, the "secretion or destruction" of papers covered by the subpoena; or that there was a "secretion or destruction" of any such papers of which he even had knowledge. Furthermore, as the testimony of Post Office Inspector Bradley, referred to in the brief and made an appendix thereto, dealt exclusively with conduct of Brittin—which, we cannot too often repeat, respondent did not participate in, was not connected with, and, at the time of the occurrence, had not the slightest knowledge of [R. 7, 31-32; 58-59; 60; 67],—it is obviously without relevance to any issue in this case and the purpose of its attempted importation into the record, of which it is no part, is not made clear in petitioner's brief. There is not, and never has been, any dispute with respect to the facts just above stated. The demurrer admits the unqualified allegations of these facts. The Bradley testimony in no way contradicts them in any detail. There is nothing whatever in the Bradley testimony which connects, or attempts to connect, respondent with the papers referred to by Inspector Bradley. Hence the irrelevancy of that testimony, now for the first time lugged into this case under the claim that because the report thereof has been incorporated in a public document this Court takes judicial notice of the facts testified to by the witness; a claim which, in the circumstances, it is not necessary to discuss. Certainly our distinguished opponents will not here argue that, assuming there was anything wrong in the action of respondent's partner, Lee, in allowing Brittin access to the files of his own papers, the Senate could hold respondent in contempt because of *that* wrong, or that respondent could in any tribunal be penalized therefor.

Once again, concededly, respondent had no connection with the Brittin incident; it has never been heretofore argued that he had; it cannot truthfully be charged or fairly argued that he had. Upon that incident the Senate

could no more base the right to hold this respondent in contempt than it could hold in contempt one who had never been summoned to appear before its Committee or one who, having been so summoned, declined to answer questions manifestly not pertinent to the inquiry. [*McGrain* vs. *Daugherty*, 273 U. S. 175-6; *Sinclair* vs. *United States*, 279 U. S. 291-2.]

To return to *Marshall* vs. *Gordon* (from which we were diverted by our discussion of the indirect attempt to lay the Brittin incident at the door of respondent), the language of this Court in that case relied upon by petitioner here merely means that even if the offense originally committed was the doing of an act which had been prohibited by a competent authority, punishment could still be administered which would be civil and remedial in character if, in the exercise of a fair discretion, the tribunal affected could determine from the circumstances that unless restrained or otherwise punished the offense would be *immediately* repeated, to the continued or further interference of the proceedings. To hold otherwise would be to ignore entirely the essential differences between civil and criminal contempts and the objects and purposes of punishment therefor which have been recognized by all the authorities, at least since the decision of this Court in the case of *Gompers* v. *Bucks Stove & Range Co.*, *supra*.

In discussing the case of *Marshall* v. *Gordon*, petitioner while contending that the Senate has the power to punish a private citizen for acts which are in no way interfering with any legislative function at the time the power to punish is exerted, and, in respect of which, at that time, there is no possibility of immediate, or even remote, recurrence, nevertheless admits that the asserted power "*is limited to imprisonment and such imprisonment may not be extended beyond the session of the body in which the contempt occurred.*" [Brief, p. 21].

If, as petitioner contends, the Senate has the power to administer punishment as such, then, we ask, Why is

this punishment confined to imprisonment only? Why has not the Senate the power to punish by fine or by both fine and imprisonment? If the Senate may impose a sentence for the definite period of ten days, why can it not impose one of ten months or two years? And lastly, why can not the imprisonment extend beyond the session?

If petitioner's contention is correct then the Senate would have the power to do all of the things suggested in the above questions. But, petitioner admits that the Senate has no such powers. Why? The rule can be no broader than the reasons which give rise to it. The reason that the Senate can do none of the things suggested in the above questions is because its power is remedial and coercive only. As the courts have said, the party imprisoned may at any time recant and therefore there is always in his possession the key to his prison. Hence, as conceded, [Petitioner's brief, p. 21] "the power 'is limited to imprisonment' ". It is for the same reason that the Senate can not imprison beyond the session in which the contempt occurred [Petitioner's brief, p. 21] because to do so would nullify the above-stated rule. As soon as the Senate adjourns the prisoner is deprived by the Senate's own action of the opportunity to recant, thereby opening his prison door, and, therefore, it necessarily follows that upon adjournment the prisoner must be released. None of this would be true if, as insisted in this case, the Senate—not to compel, to coerce, but—has the constitutional power to punish by imprisonment for a definite period by it prescribed. We submit that the concession made in the quoted matter, at the foot of page 21 of petitioner's brief here, destroys his entire case—and that concession but quotes the law as settled by this Court.

Petitioner also relies on the cases of *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, and *ex parte Grossman*, 260 U. S. 87.

The first of these cases, while dealing with contempt,

deals with an act alleged to be in contempt of a judicial tribunal.

While this court in that case recognized that the method of proceeding against one in contempt of either legislative or judicial tribunals was essentially similar, if the power to proceed at all existed, there is nothing in that case which affords justification for the exercise by a legislative body of judicial functions such as is here involved. In the course of its opinion the court repeatedly took occasion to observe the differences between judicial functions and legislative functions which were set out in the case of *Marshall* v. *Gordon*. There it was said (p. 418):

> "While the *Marshall* case concerned the exercise of legislative power to deal with contempt, the fundamental principles which its solution involved are here applicable, *to the extent that they may not be inapposite because of the distinction between legislative and judicial power*. Indeed the identity of the constitutional principles applicable to the two cases, *subject to the differences referred to* was pointed out on pages 542 and 543, where it was said: 'So also when *the differences between the judicial and legislative powers are considered* and the divergent elements which in the nature of things enter into the determination of what is self-preservation in the two cases, the same result is established by the statutory provisions dealing with the judicial authority to summarily punish for contempt, that is, without resorting to the modes of trial required by constitutional limitations or otherwise for substantive offenses under the criminal law."

In the teeth of this decision specifically recognizing the *differences* between the judicial and legislative powers to punish for contempt the petitioner in his brief (p. 25) in referring to this decision says:

> "Here this court holds that the principles applicable to the legislative and judicial power to punish summarily are *identical* * * *"

Such a statement is conclusive evidence of a misunderstanding of the rule of that case and an attempt here to justify the threatened action of the Senate by imputing to the language of this Court, used in a former case, a meaning which is clearly not only not conveyed but expressly excluded.

The acts of Marshall complained of in *Marshall* v. *Gordon*, and of the editors of the Toledo News Bee, charged as contempt in *Toledo Newspaper Company* v. *United States*, were strikingly similar. Yet this Court held that the legislative body could not punish Marshall, but that the judicial body could punish the newspaper editors: a clear recognition of the fundamental difference between the legislative and judicial power to inflict punishment, as punishment, for contempt.

The case of *ex parte Grossman, supra,* involved the power of the President to pardon a criminal contempt committed by disobedience of an injunction issued by a District Court in pursuance of the prohibition law. After a detailed examination into the authorities concerning the power of Executive pardon, this Court decided that inasmuch as the contempt there involved was a criminal, as distinguished from a civil contempt, that the executive had such power. This case not only falls short of being an authority for petitioner's position, but, on the contrary, clearly recognizes and applies the difference between civil contempt and criminal contempt as pointed out in the case of *Gompers* v. *Bucks Stove & Range Company, supra,* and upon which respondent here relies.

C.

THE MAJORITY OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA FULLY RECOGNIZED AND APPLIED THE LAW AS ESTABLISHED BY THE DECISIONS OF THIS COURT TO THE FACTS IN THIS CASE.

We believe that in our treatment of the cases we have established the following propositions with respect to the constitutional power of the Senate in such cases.

1. That the power of the Senate to deal directly with

the conduct of a person not a member alleged to have committed a contempt against that body is an implied and necessarily a limited power.

2. That the purported exercise of that power under the circumstances of a particular case is not only a legitimate field for judicial inquiry, but contemplated by our constitutional form of government.

3. That such power cannot be exercised by the legislative branch of our Government or either House thereof when the purpose of such exercise is the administration of punishment as such rather than as an aid in the performance of a proper legislative function.

The application of these principles to the facts of the case at bar is at once manifest, the result self-evident.

We have heretofore shown that the respondent's acts were completed acts; that if he had committed any offense, it was by the doing of an act which had been prohibited by the Senate through the service of its subpoena; that there was not only no likelihood but there was no possibility of a repetition of the conduct which was obnoxious to the Senate; and that what had been done *by him,* innocently or otherwise, had been undone and therefore could not be in any way affected by any punishment which could be meted out to him. We have also shown that the Senate in Senate Resolution 172 did not even attempt to disguise the fact that the punishment proposed by it was not to aid in the performance of a legislative function; it was in no sense remedial.

Under the rule of the *Gompers* case, the offense, if any, would have constituted criminal contempt if the authority of a court had been involved. Can it be otherwise because the tribunal affected was legislative rather than judicial? Other than a negative answer would ignore the rule as well as the basis therefor (*Gompers* v. *Bucks Stove & Range Co., supra; Kilbourn* v. *Thompson, supra*).

Can the guilt or innocence of a person charged with the commission of acts which, if established, would make him guilty of a criminal contempt, be tried in other than "a

tribunal appointed by law," which tribunal is to be "governed by rules of law previously established"? The due process clause of the Fifth Amendment, as interpreted in the cases of *Kilbourn* v. *Thompson* and *Marshall* v. *Gordon,* as well as many other cases, says that it cannot. Moreover, we have the statement in *Marshall* v. *Gordon* that legislative tribunals have not heretofore attempted to exercise such power, save in a few cases wherein the distinction between judicial and legislative power were forgotten or "for the moment" overlooked.

If the power asserted by the Senate in this case exists, what has become of the constitutional separation of powers which this Court, in *Marshall* v. *Gordon,* described as "interwoven in the fabric of our constitution"?

We respectfully submit that an examination of the majority opinion of the United States Court of Appeals for the District of Columbia discloses that each of these questions was fully weighed and considered and that the answers thereto were given in a manner which is compelled by the decisions of this Court upon the subject.

The dissenting opinion below fails to recognize and apply these principles but on the contrary holds in effect that the desire of the Senate affected by an act which it regards as a contempt of its authority is in and of itself a justification for the exercise of the power to punish directly and as punishment; another statement of the "necessity" doctrine urged first upon this Court in the case of *Anderson* v. *Dunn* and reiterated in the case of *Kilbourne* v. *Thompson* and rejected flatly in that case and in *Marshall* v. *Gordon.* It fails utterly to recognize the fundamental distinction between the power of Congress, in its discretion, to make particular acts punishable under the general criminal laws accompanied by the power of either House in such cases as affect it to direct the proper enforcement officers to proceed thereunder, and the lack of power of either House to inflict punish-

ment as punishment directly for acts constituting contempt of its authority.

D.

CONCLUSION.

More than half a century ago this Court in the case of *Kilbourn* v. *Thompson, supra,* commented on the scope and effect of the three primary articles of the Constitution and the division of all Federal powers accomplished thereby to the Executive, the Legislative, and the Judicial Departments. There, after stating that it necessarily followed from this division that the powers confided by the Constitution to one department cannot be exercised by another, the Court said (103 U. S., at 191-2):

> "It may be said that these are truisms which need no repetition here to give them force. But while the experience of almost a century has in general shown a wise and commendable forbearance in each of these branches from encroachments upon the others, it is not to be denied that such attempts have been made, and it is believed not always without success. The increase in the number of the States, in their population and wealth, and in the amount of power, if not in its nature to be exercised by the Federal Government, presents powerful and growing temptations to those to whom that exercise is intrusted, to overstep the just boundaries of their own department and enter upon the domain of one of the others, or to assume powers not intrusted to either of them."

The basic division of constitutional powers and the underlying reasons for the encroachment of one department upon the functions of another are the same now as then.

That the decision of the United States Court of Appeals for the District of Columbia should be affirmed is—

Respectfully submitted,

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Attorneys for Respondent.

Washington, D. C.,
January 2, 1935.

APPENDIX

The following sections of the Revised Statutes were derived from an act of January 24, 1857, entitled "An act more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." 11 Stat. 155, c. 19.

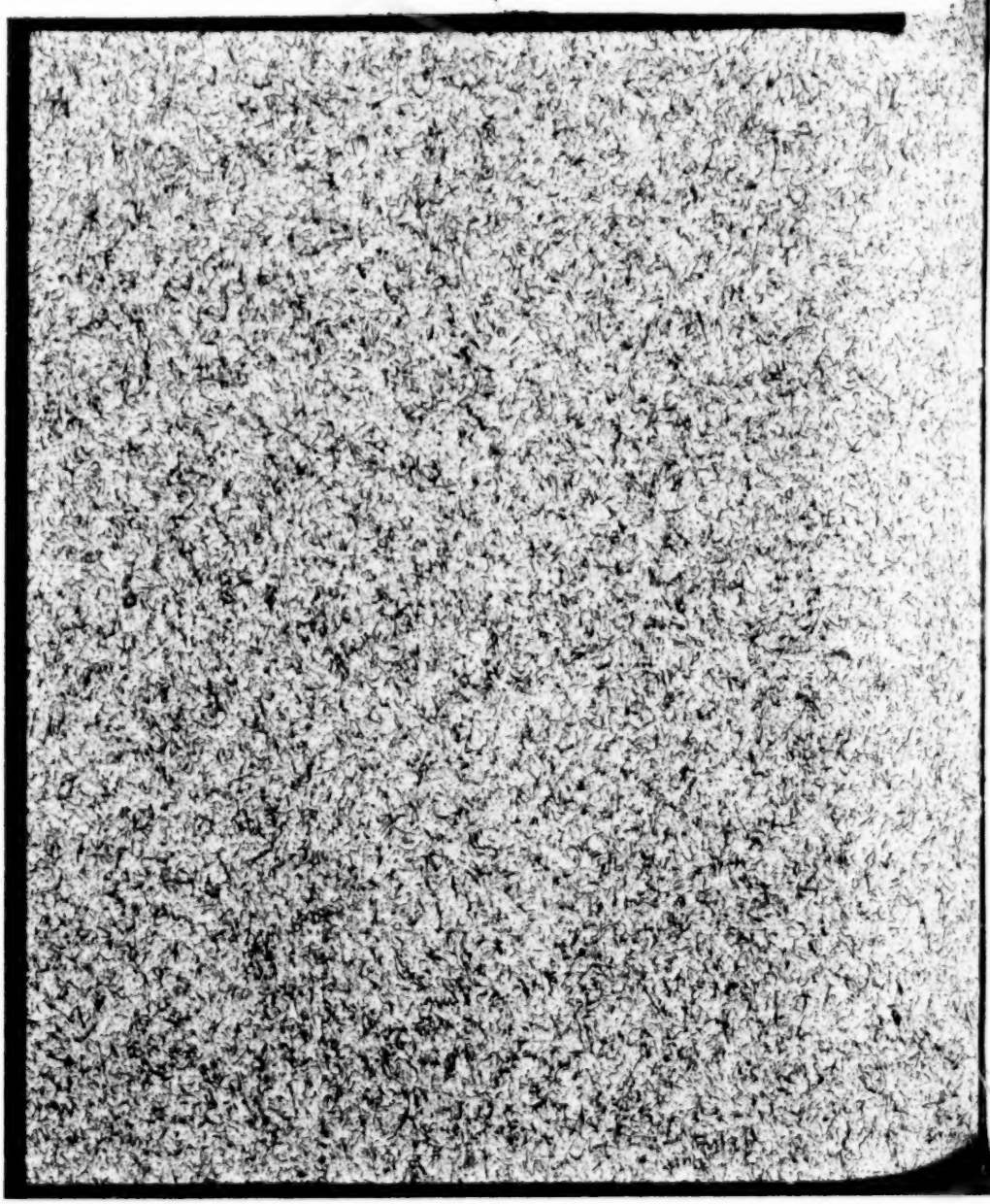
"Sec. 102. Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars nor less than one hundred dollars, and imprisonment in a common jail for not less than one month nor more than twelve months.

"Sec. 103. No witness is privileged to refuse to testify to any fact, or to produce any paper, respecting which he shall be examined by either House of Congress, or by any committee of either House, upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous.

"Sec. 104. Whenever a witness summoned as mentioned in section one hundred and two fails to testify, and the facts are reported to either House, the President of the Senate or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the district attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action.

"Sec. 859. No testimony given by a witness before either House, or before any committee of either House of Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

OPINION



SUPREME COURT OF THE UNITED STATES.

No. 339.—October Term, 1934.

Chesley W. Jurney, Petitioner, vs. William P. MacCracken, Jr. } On Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1935.]

Mr. Justice Brandeis delivered the opinion of the Court.

This petition for a writ of habeas corpus was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr. against Chesley W. Jurney, the Sergeant-at-Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District with directions to discharge the prisoner from custody. 72 F. (2d) 560. This Court granted certiorari because of the importance of the question presented. 293 U. S. —.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The Resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givvin, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpoena had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an enquiry which it had the constitutional power to make; that the Committee[1] had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. *McGrain* v. *Daugherty*, 273 U. S. 135. No question is raised as to the propriety of the scope of the subpoena *duces tecum*, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpoena—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the Special Committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail". MacCracken had been served, on January 31, 1934, with a subpoena *duces tecum* to appear "instanter" before the Committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he is a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the Committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the Committee, telegraphed to

[1]Pursuant to Senate Resolution 349, 72nd Congress, Second Session.

each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1, produced all the papers relating to the business of the clients who had so consented.

On February 2, before the Committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1, he personally permitted Givven, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Givven, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice-president of Northwest Airways, Inc., without MacCracken's knowledge, requested, and received from, his partner Lee permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the Committee. Brittin removed from the files some papers; took them to his office; and, with a view to destroying them, tore them into pieces and threw the pieces into a waste-paper basket.

Upon the conclusion of MacCracken's testimony on February 2, the Committee decided that none of the papers in his possession could be withheld under the claim of privilege.[2] Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the Committee all the papers then remaining in the files. On February 3, (after a request therefor by MacCracken) Givven restored to the files what he stated were all the papers taken by him. The pe-

[2]Upon the conclusion of the hearing on February 2, the Committee made to the Senate a repor (No. 254) setting forth the facts elicited. Thereupon the Senate, by Resolution No. 169, directed a warrant to issue, commanding the Sergeant-at-Arms to take MacCracken into custody before the bar of the Senate; "to bring with him the correspondence . . . referred to and then and there to answer such questions pertinent to the matter under inquiry . . . as the Senate may propound. . . ." The warrant was served on February 2, 1934; MacCracken was paroled in the custody of his counsel to appear at the bar of the Senate at noon, February 5, 1934. On

tition does not allege that any of the papers taken by Brittin were later produced.[3] It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States "to the best of his ability, knowlege and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 . . . all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in *Kilbourn* v. *Thompson,* 103 U. S. 168, there was no legislative duty to be performed; or because, as in *Marshall* v. *Gordon,* 243 U. S. 521, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending

that day (in view of Resolution No. 172) he was released from custody under Resolution No. 169; and the proceedings under Resolution No. 169 are not here involved.

[3]But the brief for MacCracken, the respondent, states: "By February 6th every recoverable paper involved in the Brittin incident had been recovered and delivered to the Senate." The reference in the brief is to the fact (to which attention was called by counsel for Jurney) that, after MacCracken and Brittin had testified, post office inspectors, acting for the Committee, searched the sacks of waste papers taken from Brittin's office; and succeeded in collecting most of the pieces of the papers which Brittin destroyed. By pasting these pieces together they were able to restore for the Committee most of the papers removed from the Northwest Airways, Inc., files. (Senate Document No. 162, 73rd Cong., 2nd Sess., pp. 106-116.

act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795;[4] and since then it has been exercised on several occasions.[5] It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies.[6] In *Anderson* v. *Dunn*, 6 Wheat. 204, decided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in *Marshall* v. *Gordon*, *supra*, upon which MacCracken relies, must be read in the light of the particular facts.

[4]Robert Randall and Charles Whitney were taken into custody by the House of Representatives, on December 28, 1795, on charges of attempting to bribe some of its members. Whitney was discharged on January 7, 1796, before trial. Randall, however, on January 6, was found guilty of a contempt and of a breach of the privileges of the House, was reprimanded by the Speaker, and was committed to the custody of the Sergeant-at-Arms until further order of the House. On January 13, his petition to be discharged from custody was granted, upon payment of fees. 5 Annals, 4th Cong., 1st Sess., 166-195, 232, 200-229, 237, 243.

[5]In 1832, Samuel Houston, having been arrested and tried by the House of Representatives for assaulting a member, was reprimanded and discharged on payment of fees. 8 Debates, 22nd Cong., 1st Sess., 2512-2620, 2810-3022. In 1865, A. P. Field was taken into custody for assaulting a member and was reprimanded by the Speaker. 70 Globe, 38th Cong., 2nd Sess., 991. So too, Charles C. Glover, in 1913. Cong. Rec., 63rd Cong., 1st Sess., 281-283, 499-503, 1431-1453. In 1870, Patrick Wood, for a similar offence, was imprisoned for three months by order of the House. 94 & 95 Globe, 41st Cong., 2nd Sess., 4316-17, 4847, 5253, 5301. In 1795, Sen. James Gunn, whose challenge of a member of the House was considered a breach of privilege, escaped with an apology. 5 Annals, 4th Cong., 1st Sess., 786-790, 795-798. See Shull, Legislative Contempt—An Auxiliary Power of Congress (1934) 8 Temple L. Quart. 198.

[6]See Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 U. of Pa. L. Rev. 691, 700-719; Clarke, Parliamentary Privilege in the American Colonies, Essays in Colonial History Presented to Charles McLean Andrews (1931), pp. 124, *et seq.*; May, Law and Usage of Parliament (5th ed., 1863), pp. 83-97. Since the American Revolution, it has been held that colonial

It was there recognized that the only jurisdictional test to be applied by the court is the character of the offence; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means.[7] Compare *Ex parte Nugent,* Fed. Cas. No. 10,375; *Stewart* v. *Blaine,* 1 MacArthur 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power concerned, not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power.[8] The ground for

assemblies of the British Empire, have, in the absence of express grant, and "without any usage, any acquiescence, or any sanction of the Courts of Law," no power to adjudicate upon, or punish for, contempts, Kielley *v.* Carson, 4 Moore P. C. 63; even when the contempt is committed in the presence of the Assembly by one of its own members. Doyle *v.* Falconer, L. R. 1 P. C. 328; Barton *v.* Taylor, 11 App. Cas. 197; compare Whitcomb's Case, 120 Mass. 118, 122. But upon some colonial assemblies contempt powers as broad as those of the British House of Commons have been conferred. Compare Dill *v.* Murphy, 1 Moore P. C. (N. S.) 487; The Speaker of the Legislative Assembly of Victoria *v.* Glass, L. R. 3 P. C. 560; Fielding *v.* Thomas (1896) App. Cas. 600.

[7]The many instances in which the Houses of Congress have punished contumacious witnesses for contempt are collected and discussed in Eberling, Congressional Investigations (1928). See, too, Dimock, Congressional Investigating Committees (1929); Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harv. L. Rev. 153; compare May, *op. cit., supra,* pp. 407, 408. Witnesses found guilty of prevaricating before investigating committees have been imprisoned by the House of Commons under circumstances indicating that there was no thought of inducing further testimony, but only of punishing for the past offence. See case of Charles Woolfen, 112 Comm. Jour. 354, 372, 377; of Acton, Sheriff of London, Petyt, Miscellanea Parliamentaria (1680) p. 108; of Randolph Davenport, *Id.,* p. 120.

[8]See remarks of Sen. Charles Pinckney in the case of the Editor of the Aurora, 10 Annals, 6th Cong., 1st Sess., 69; of Rep. Barbour and Rep. Poindexter in the case of Colonel Anderson, 32 Annals, 15th Cong., 1st Sess., 624, 654; of Rep. Polk in the case of Samuel Houston, 8 Debates, 22nd Cong., 1st Sess., 2512; of Sen. Sumner in the case of Thaddeus Hyatt, 53 Globe, 36th Cong., 1st Sess., 1100; see, too, Jefferson's Manual, §§ 293-299.

such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, *Kilbourn* v. *Thompson, supra*; and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes. *Marshall* v. *Gordon, supra.*

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, R. S. § 102, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare *Sinclair* v. *United States*, 279 U. S. 263. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses.[9] That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in *In re Chapman*, 166 U. S. 661, 671-672: "We grant that Congress could not divest itself or either of its Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. Compare *Ex parte Hudgings*, 249 U. S. 378, 382.[10] As was said in *In re Chapman, supra*, "the same act may be an offence against one jurisdiction and an offence against another; and indictable statutory offences may be punished as such while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being *diverso intuito* and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legis-

[9]See remarks of Rep. Orr, 43 Globe, 34th Cong., 3rd Sess., 404, 405.

[10]Samuel Houston was in fact indicted, convicted and fined in the criminal court of the District of Columbia on account of the same assault for which he was reprimanded by the House. See 2 Ops. Attys. Gen. 655.

lative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the Committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers". Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597; *Henry* v. *Henkel*, 235 U. S. 219; *Matter of Gregory*, 219 U. S. 210.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.

Mr. Justice McReynolds took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.